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Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 380)

Supreme Court of the United States

OCTOBER TERM, 1946

No. 731

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, D.B.A. CRYSTAL BALLROOM, PETITIONERS,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, GRIFF WILLIAMS, ET AL.

No. 732

LARRY V. GEER AND MARGARET GEER, D.B.A. LARRY GEER BALLROOMS, PETITIONERS,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 29, 1946.

CERTIORARI GRANTED JANUARY 6, 1947.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 13,124.
CIVIL.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,
APPELLANT,

vs.

ROY BARTELS, ED BARTELS, CARL BARTELS, AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM;
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 7, 1945.

No. 13,125.
CIVIL.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,
APPELLANT,

vs.

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 7, 1945.

No. 13,127.
CIVIL.

GRIFF WILLIAMS, BILL CARLSEN, TINY, HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS,
APPELLANTS,

vs.

ROY BARTELS, ED BARTELS, CARL BARTELS, AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 10, 1945.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1946, of said Court, before the Honorable Archibald K. Gardner, the Honorable Joseph W. Woodrough and the Honorable Harvey M. Johnsen, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the 7th day of July, A. D. 1945, transcript of records pursuant to appeals from the District Court of the United States for the Southern District of Iowa in the cases of E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant, vs. Roy Bartels, et al., Appellees, and E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant, vs. Larry V. Geer, et al., Appellees, and on the 10th day of July, A. D. 1945, transcript of record pursuant to appeal from the said District Court in the case of Griff Williams, et al., Appellants, vs. Roy Bartels, et al., Appellees, were filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, which said transcripts as prepared and printed, pursuant to designation and stipulation, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, are in the words and figures following, to-wit:

[fol. 1] Pleas and Proceedings before the Honorable Chas. A. Dewey, Judge of the District Court of the United States for the Southern District of Iowa, in certain causes lately pending in the Central Division of said Court, wherein E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa is Appellant, and Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d/b/a/ Crystal Ballroom are Appellees; Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead are Appellants and Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d/b/a/ Crystal Ballroom are Appellees, and E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa is Appellant and Larry V. Geer and Margaret Geer, d/b/a/ Larry Geer Ballrooms are Appellees.

Be It Remembered, That on the 3rd day of January, A. D. 1944, there was filed in the District Court of the United States for the Southern District of Iowa, Central Division, a Complaint in the case of Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, d/b/a/ Crystal Ballroom, Plaintiffs, vs. E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant, which case was numbered 294-Civil Action, Central Division, said complaint being in words and figures as follows:

[fol. 2] Complaint.

In The District Court Of The United States In And For The Southern District Of Iowa, Central Division.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, d/b/a/ Crystal Ballroom, Plaintiffs,

No. 294 vs. Civil Action

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant.

Plaintiffs for their cause of action allege:

I.

Plaintiffs are residents and citizens of Iowa, engaged in business in the County of Dubuque, Iowa, as a copartnership doing business under the name of the Crystal Ballroom.

II.

At all times mentioned herein the defendant was and still is the duly appointed, qualified and acting Collector of Internal Revenue of the United States of America for the District of Iowa.

III.

This action arises under the Act of Congress known as the Federal Insurance Contributions Act, approved February 10, 1939, as Subchapter A. of Chapter 9 of the Internal Revenue Code (53 Stat. 175).

IV.

That during the years 1940, 1941 and 1942, Plaintiffs operated a ballroom in Dubuque, Iowa, known as the Crystal Ballroom, wherein were held dances for the enter- [fol. 3] tainment and amusement of the public for which an admission charge was made; that music for such dances was furnished by traveling orchestras which were permanent organizations engaged in the business of furnishing music for dance engagements for ballroom operators, fraternal and social clubs, charitable organizations, lodges, American Legion Posts, police and fire departments and college and high school classes, most of such engagements being for one evening's duration.

V.

That one of such traveling orchestras which furnished dance music for engagements at said Crystal Ballroom on October 13, 1940, and September 1, 1941, was an orchestra known in the entertainment world since the year 1935 as Griff Williams and His Orchestra, which consisted of from twelve to fourteen musicians under the leadership of Griff Williams; that each of such engagements was booked for said orchestra by the Music Corporation of

America, a booking agent that Griff Williams had made his exclusive representative for the purpose of booking engagements for his orchestra, for which services such agent was paid a commission by Griff Williams; that in order to secure such orchestra for said engagement on October 13, 1940, Plaintiffs were required by said Music Corporation of America to execute the contract, a copy of which is attached hereto, marked Exhibit "A" and by this reference made a part hereof, and in order to secure such orchestra for said engagement on September 1, 1941, Plaintiffs were required by said Music Corporation of America to execute the contract, a copy of which is attached hereto, marked Exhibit "B" and by this reference made a part hereof.

VI.

Under date of June 24, 1942, Plaintiffs caused a letter to be addressed and mailed to the Commissioner of Internal Revenue at Washington, D. C., in which letter said Commissioner was specifically requested to rule whether Griff Williams and the members of his orchestra were the employees of the operator of the Crystal Ballroom under [fol. 4] the Federal Insurance Contributions Act during each of the engagements by said orchestra at such ballroom; that although said Commissioner received said letter within a few days after the same was mailed, plaintiffs have never in the period of more than seventeen months which have elapsed since that time received a ruling as requested in such letter.

VII.

That in a further attempt to secure a ruling from the Commissioner of Internal Revenue as to whether Griff Williams and the members of his orchestra were the employees of the Plaintiffs under the Federal Insurance Contributions Act on the two occasions when said orchestra performed its aforesaid engagements at the Crystal Ballroom, Plaintiffs, on or about May 5, 1943, filed in the office of the Collector of Internal Revenue at Des Moines, Iowa, a Supplemental Employer's Tax Return on Form SS-1a under said Act, attaching to said return Plaintiffs' check in the sum of $26.98; that included in said return and payment were employer's and employee's taxes com-

puted under the Federal Insurance Contributions Act with respect to sums paid for the services of not only Griff Williams and His Orchestra for the two aforesaid engagements but also several other orchestras for engagements at said Crystal Ballroom during the years 1941 and 1942, names of such orchestras and the dates of their respective engagements being as follows:

Name	Date
Bill Carlsen and His Orchestra	August 17, 1941
Tiny Hill and His Orchestra	September 28, 1941
Boyd Raeburn and His Orchestra	October 5, 1941
Buddy Fisher and His Orchestra	November 23, 1941
Paul Moorhead and His Orchestra	January 18, 1942

That in order to secure the services of each of the above orchestras, Plaintiffs were required to execute the same form of contract as that contained in the contract of which Exhibit "B" attached hereto is a copy.

That the employee's tax included in said payment of $26.98 was not withheld from any sums paid said orchestras [fol. 5] but was paid by Plaintiffs with their own personal funds.

VIII.

That on or about May 29, 1943, Plaintiffs filed with the Collector of Internal Revenue at Des Moines, Iowa, on Form 843, a claim for refund of said taxes amounting to $26.98; that no determination has ever been made by the Commissioner of Internal Revenue with respect to said claim; that more than six months has elapsed since the filing of said claim for refund and that Plaintiff is at the date hereof authorized by law to bring this action against Defendant for the recovery of said amount.

IX.

That Plaintiffs are entitled to have said taxes refunded to them for the reason that Plaintiffs were not the employers of the leader and members of any of the hereinabove named orchestras within the meaning of the Federal Insurance Contributions Act on the occasion of its engagement for Plaintiffs at said Crystal Ballroom and, hence, no taxes thereunder were due from the Plaintiffs

with respect to the sum of money which it paid said orchestra in performing said engagement; that the leader of each of such orchestras was an independent contractor and he, and not Plaintiffs, was the employer of the members of his orchestra for the purposes of the Federal Insurance Contributions Act and solely responsible for the taxes imposed by that enactment with respect to the sums of money received by the members of his orchestra for their services in performing the orchestra's engagement at said Crystal Ballroom.

X.

That Griff Williams, on the occasion of his orchestra's engagement of October 13, 1940, for Plaintiffs, was an independent contractor and the employer of the members of his orchestra for the reasons that he was engaged in an independent business for profit and he alone, and not Plaintiffs:

[fol. 6] (1) Hired and discharged the members of his orchestra and determined the cause therefor.

(2) Determined the time, place and amount of payment of the compensation of such members and was liable to the members of his orchestra for such compensation irrespective of whether he received the contract price for said engagement.

(3) Had the right to control the details and manner of the performances of the orchestra members and exercised such control in that he:

(a) dictated the style of music, length and tempo, volume, selections and time for feature performances.

(b) determined the instrumentation.

(c) determined the attire of the members.

(d) either provided or arranged for the transportation of the members to and from said engagement.

(e) told the members where and when to report for the performance of the engagement.

(f) determined the time and place of rehearsals and numbers to be rehearsed, and at such rehearsals directed

the members in their efforts to produce the type of music which he desired the orchestra to play.

(g) determined placing of musicians on the bandstand.

(h) selected and compiled the music library from which the dance pieces were played.

(i) saw to it that the orchestra, in the rendition of its [fol. 7] services, carried out his ideas of showmanship and the type and style of music to be played.

That Plaintiffs, in executing the contract of which Exhibit "A" attached hereto is a copy, were not concerned with and did not know, the names of the members of Griff Williams' orchestra or the amounts of compensation received by them; that Plaintiffs were familiar with the reputation and special quality of music of such orchestra and relied on Griff Williams to furnish an organization composed of musicians selected, rehearsed and capable of performing such quality of music.

XI.

That, except for the form of contract of which Exhibit "B" attached hereto is a copy, the facts and circumstances relating to Griff Williams and the members of his orchestra and its performance of the engagement on September 1, 1941 for Plaintiffs at said Crystal Ballroom were identical with the facts and circumstances relating to Griff Williams and the members of his orchestra and its performance of the engagement of October 13, 1940, at said ballroom; that although said contract purports to create the relationship of employer and employee between Plaintiffs and Griff Williams and the members of his orchestra, it did not and could not have that effect for the following reasons:

(1) Plaintiffs and Griff Williams and the members of his orchestra could not change their true relation, as shown by the actual facts, through mere nomenclature and artful language in a written contract, particularly where such contract represents a skillful, painstaking and ingenious attempt to avoid liability for taxes imposed by legislative enactment; that the contract of which Exhibit "B" attached hereto is a copy is such a contract, having been [fol. 8] prepared by the American Federation of Mu-

sicians for the express purpose of endeavoring to shift the responsibility for the payment of Social Security and employment taxes from the leader or owner of an orchestra, as the actual employer of its members, to the person engaging such orchestra's services; that such purpose is shown not only by the terms of the contract itself, but also by the contents of a notice given to all locals of the American Federation of Musicians on May 1, 1941 and signed by James C. Petrillo and Fred W. Birnbach, President and Secretary respectively of such Federation, a copy of which notice is attached hereto marked Exhibit "C" and by this reference made a part hereof.

(2) That the actual practice followed by Plaintiffs and Griff Williams and His Orchestra during its second engagement at the Crystal Ballroom was the same as the actual practice followed by them during such orchestra's first engagement at said ballroom, which fact shows that neither Plaintiffs nor Griff Williams and the members of his orchestra ever intended the provision therein relating to the control of the orchestra's services in fact to be operative.

(3) That said contract was used by Music Corporation of America, Griff Williams and Plaintiffs for the purpose of remaining in good standing with the American Federation of Musicians and not for the purpose of reflecting the actual facts pertaining to the engagement.

(4) Under Section 29 of Article X of the By-Laws of the American Federation of Musicians in effect during the [fol. 9] year 1941 and at all times since 1941, which by-laws are made a part of said contract by an express provision therein, Griff Williams and the sidemen in his orchestra, as members of the Federation, were prohibited under penalty of expulsion from said Union from accepting engagements with Plaintiffs and hence no relationship of employer and employee could exist between Plaintiffs and the sidemen in Griff Williams' orchestra. A true copy of Section 29 of Article X of said By-Laws is attached hereto, marked Exhibit "D" and by this reference made a part hereof.

(5) The members of Griff Williams' orchestra are not described in said contract with sufficient certainty to make them parties thereto.

(6) The provision in the contract purporting to vest control of the orchestra's services in Plaintiffs is so indefinite that unless it be considered as referring to control over results to be accomplished under the contract, the provision is utterly meaningless and of no effect whatever.

XII.

That, except for the form of contract, the facts and circumstances relating to each of the other orchestras named in Paragraph VII hereof in the performance of its said engagement for Plaintiffs at the Crystal Ballroom were substantially the same as the facts and circumstances relating to Griff Williams and the members of his orchestra in the performance of its engagement of October 13, 1940 for Plaintiffs at the Crystal Ballroom as alleged in Paragraph X hereof, and hence, the leader of each of such orchestras was an independent contractor and the employer [fol. 10] of the members of his orchestra for the purposes of the Federal Insurance Contributions Act; that said form of contract did not have the effect of creating the relationship of employer and employee between Plaintiffs and the leader and the members of any of said orchestras for the same reasons as those set forth in Paragraph XI hereof in support of Plaintiffs' allegation that the form of contract of which said Exhibit "B" is a copy did not have the effect of creating such relationship between Plaintiffs and Griff Williams and the members of his orchestra on the occasion of its engagement of September 1, 1941 for Plaintiffs at the Crystal Ballroom.

Wherefore, Plaintiffs demand judgment against the Defendant in the sum of $26.98, together with interest at the rate of 6% per annum from and after the 5th day of May, 1943, and costs and such other relief as the Court may decree.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
Attorneys for Plaintiff,
4th Floor, Empire Bldg.
Des Moines, Iowa.

[fol. 11] Exhibit "A"

Music Corporation of America No. 1279 CO

Representing September 14, 1940 RF:MS

Griff Williams And His Orchestra .....
(Attraction) (No. of artists or musicians)

The undersigned employer engages the attraction above named and attraction agrees to perform upon the following terms:

Date(s) of engagement October 13, 1940

Place of engagement Crystal Ballroom

Street Address.....City and State Dubuque, Iowa

Hours And Special Instructions:

Attraction agrees to play or perform for three consecutive hours (with usual intermissions) beginning at 9:00 P. M. Standard Time at place of engagement, unless otherwise herein provided. Place Of Engagement Must Be Specified.

Deposit To Be Made By Money Order, Bank Draft Or Cashiers Check.

Hours: 9 P. M. to 1 o'clock A. M.

"Management, Music Corporation Of America"

Must appear in all announcements and advertising matter of employer wherever the name of the attraction is used.

Privilege Sixty Percent Of Gross Receipts, Guarantee

Price agreed upon $300.00

Deposit $150.00 (Certified)

Received $150.00
9-16 1940
M. C. A. by M. A.

Check, Money Order, or Bank Draft) Balance to be paid in United States currency to Attraction Leader of Music Corporation of America, on its demand before 10:00 P. M. on date of engagement, or earlier on his or its demand.

Overtime Charge.....

It is agreed that all the laws, rules, and regulations of the American Federation of Musicians are a part of this contract. Employer agrees to pay the difference, if any, between the compensation herein provided and a sum equal to five (5%) percent over the Federation scale in effect. Terms of resale of attraction by Employer must comply with regulations and prices of the Federation Local wherein attraction is to perform. In signing this contract, the Employer acknowledges his (her or their) authority to do so, and also hereby assumes liability for the amount stated herein. Agreement of attraction to perform is subject to detention by sickness, accident, or accident to means of [fol. 12] transportation used by attraction, or by any act or regulation of any public authority, civil tumult, strike, epidemic, serious interruption of transportation services or any legitimate or unavoidable cause, strikes, Acts of God, and conditions beyond control of such attraction or representative. There are no exceptions to this contract unless stipulated in writing. No deductions are to be made for any reason whatsoever.

The Employer agrees that the business agent of the Musicians Local in whose jurisdiction this engagement is being played may have access to the function, for the purpose of conferring with the Musicians playing this engagement.

Music Corporation of America, or the undersigned employee on its behalf, acts only as agent and does not assume any obligations whatsoever, including but not limited to, any obligation imposed under and by virtue of the Social Security Act of the United States in connection with the services rendered ~~and assumed hereunder by the Attraction.~~

No part of the performance of attraction shall be broadcast by radio or otherwise.

If the compensation of Attraction is on a guarantee and percentage basis, then employer agrees:

~~(A)~~ to use no passes except to bonafide newspaper representatives and not to reduce the stipulated dancing or admittance charges as herein fixed.

(B) that the dancing charge shall be

Per Couple $.....; Male $.....; Female $.....; Spec. $.....

(C) that the additional (gate) charge (if any) for admittance shall be:

Per Couple $.....; Male $.....; Female $.....; Spec. $.....

(d) that the charge for auto parking shall be $.....; for clothes checking $.....

(E) M. C. A. shall have the privilege of using its own tickets exclusively, and also of appointing its own ticket takers, who shall take tickets at all extrances.

Accepted by Employer Crystal Ballroom by Roy Bartels

Street Address..... City and State Dubuque, Iowa

Phone.....

Do Not Write Below This Line

Return All Copies Signed To

Attraction Sign Here.....

MUSIC CORPORATION OF AMERICA,
430 N. Michigan Avenue
Chicago

By Music Corporation Of America
Authorized Representative

Per /s/ Russell Facchine

American Federation of Musicians

License No. 1
Form 1N

[fol. 13] Exhibit "B"

Received
Chicago Office
Music Corporation of
America
1941 Jul 31 PM 1:33

Contract Blank

Music Corporation Of America

16 Old Bond St., W. I.
London
Phone Regent 6506

745 Fifth Avenue
New York
Wickersham 2-8900

111 Sutter Street
San Francisco
Phone Exbrook 8922

Union Commerce Bldg.
Cleveland
Phone Cherry 6010

430 N. Michigan Ave.
Chicago
Phone Delaware 1100

Tower Petroleum Bldg.
Dallas
Phone 2-1448

M C A Bldg.
Beverly Hills
Bradshaw 23211

This Contract for the personal services of musicians, made this 26 day of July, 1941 between the undersigned employer (hereinafter called the employer) and 13 musicians (including leader) (hereinafter called employees) represented by the undersigned representative.

Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams, according to the following terms and conditions:

Place of employment Crystal Ballroom, Dubuque, Iowa

Date(s) of employment September 1, 1941

Hours of employment 9 P M to 1 A M

Price agreed upon $350 Guarantee With A 60% Privilege Of Gross Receipts (Terms and Amount)

(Rec'd $125.00 7/31 M. E.)

To be paid $125 Deposit, Balance By 11 P M Night Of Engagement (Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

[fol. 14] It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said em-

ployer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Crystal Ballroom
By Roy Bartels

Street Address 1545 Auburn St.

City or State Dubuque, Iowa

Phone.....

Accepted by Employer Roy Bartels

Accepted .....
(orchestra leader)

By /s/ James Breyley

MUSIC CORPORATION OF AMERICA
(Representatives of Employees)

Form B

[fol. 15] Exhibit "C".

To All Locals of the
American Federation of Musicians

Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with grand opera companies and symphony orchestra.

This contract is the one which has been adopted by the Internation Executive Board for the purpose of protecting our members under the Social Security Laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

This contract and none other must be used on all such engagements on and after June 1, 1941. Any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the

American Federation of Musicians and will be subject to charges for said violation. All engagements booked by licensed agencies must be contracted on these forms.

A supply of these contracts may be secured from the International Secretary's Office.

Kindly be governed accordingly.

Fraternally yours,

JAMES C. PETRILLO,

President, A. F. of M.

Attest:

Fred W. Birnbach,

Secretary, A. F. of M.

[fol. 16] Exhibit "D".

Section 29 of Article X of By-Law of American Federation of Musicians of the United States and Canada:

"Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished, provided that in states or provinces where laws exist, which prescribe a different method of contracting, or where the provisions of law are such that to contract as above prescribed would be contrary to the interests of members, Locals are authorized to establish such method of contracting as may best conserve the interest to members. However, members may accept engagements from traveling theatre company managements direct, provided their contract, in addition to the signatures of the contracting parties, is countersigned by the musical director of the company or the member of the Federation who engages the members for the company. Furthermore, members may contract with symphony orchestra management direct in conformity with all Local and Federation laws.

"If a member violates the above, such action shall constitute his resignation from membership in such Locals where he held membership, and in the American Federation of Musicians."

[fol. 17] (Amendment to Complaint in Case No. 294 Civil Action.)

Filed in U. S. District Court March 22, 1944.

Plaintiffs hereby amend their complaint on file herein in the following particulars:

1. By adding to Paragraph VIII the following:

That subsequent to the filing of the Complaint herein, Plaintiffs received from the Treasury Department a ruling holding that with respect to the services performed by Griff Williams and His Orchestra for Plaintiffs on October 13, 1940, Griff Williams and the members of his orchestra were not the employees of the Plaintiffs, but that the individuals comprising Mr. Williams' orchestra were his employees for federal employment tax purposes. Said ruling further held that with respect to the services performed by Griff Williams and his Orchestra for Plaintiffs on September 1, 1941, Griff Williams and the members of his orchestra were employees of the Plaintiffs for purposes of the taxes in question.

That thereafter Plaintiffs were notified by the Treasury Department that their claim in the amount of $6.00, representing the federal employment taxes paid with respect to the sum received by Griff Williams and His Orchestra for services in performing said engagement of October 13, 1940, was allowed; and the balance of Plaintiffs' claim in the amount of $20.98, representing federal employment taxes paid with respect to sums paid by Plaintiffs to the other orchestras involved in said claim for refund, was disallowed; that accompanying such notice was a check of the Treasurer of the United States for the amount of refund, which check Plaintiffs cashed and received the money therefor.

2. By striking sub-paragraph (4) from Paragraph XI and inserting in lieu thereof the following:

(4) Under Section 29 of Article X of the By-laws of the American Federation of Musicians in effect during the year 1941 and at all times since 1941, which by-laws are made a part of said contract by an express provision therein, the sidemen in Griff Williams' orchestra, as members of such Federation, were prohibited under penalty of ex-

pulsion from said Union from accepting engagements with [fol. 18] Plaintiffs and hence no relationship of employer and employee could exist between Plaintiffs and said sidemen. A true copy of Section 29 of Article X of said By-laws is attached hereto, marked Exhibit "D" and by this reference made a part hereof.

3. By adding to Paragraph XI additional sub-paragraphs as follows:

(7) That said contract was not executed by the sidemen of Griff Williams' orchestra or any agent authorized by such sidemen to execute the same for them; that although said contract recites that it was accepted by the Music Corporation of America as "representative of the employees", none of said sidemen ever authorized said Music Corporation of America, either orally or by power of attorney as required by Section 48 of Article X of the By-laws of the American Federation of Musicians, to accept such contract for them, which By-law made a part of the said contract by an express provision therein recites:

"Members of the American Federation of Musicians who accept engagements for bands or orchestras must in person sign their contracts for same or give some agent power of attorney to sign their names."

(8) That although the language of said contract purports to designate the relationship between Plaintiffs and Griff Williams and the members of his orchestra as that of employer and employee, the language of certain By-laws of the American Federation of Musicians in force during the years 1940, 1941 and 1942, and made a part of the contract by an express provision therein, contradict and negative such designation by repeated references to the leader as the employer of the members of his orchestra. Such By-laws are as follows:

Section 45 of Article X: "Any member, leader or contractor employing members of the A. F. of M. on any traveling, location or out-of-town engagement shall employ only such members who are in good standing in their respective Locals and carry their Local Union Cards paid up to date."

Section 48 of Article X: "All collections for the engage-
[fol. 19] ment must be made by the member who furnishes the orchestra and not by the agent. Members of the orchestra must be paid by the contracting member or leader of the band or orchestra and not by the agent.

* * * Leaders, their agents or contracting members are prohibited from furnishing singers free of charge on any and all engagements."

Section 10 I of Article XIII: "In the selecting of the members of the orchestra, the leader or manager of the same need not confine himself to membership of the Local in whose jurisdiction the orchestra is organized."

Section 10 K of Article XIII: "All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two weeks' notice to the other."

Section 12 of Article XIII: "Any member, leader or contractor employing members of the American Federation of Musicians on any traveling, location or out-of-town engagement shall employ only such members as are in good standing in all of the Locals to which each one belongs and carry their union cards paid up to date."

4. By adding as Paragraph XIII a new Paragraph as follows:

That the leader and members of each of the orchestras mentioned herein were at all times material hereto members in good standing of the American Federation of Musicians.

5. By striking from the prayer of such Complaint the figures "26.98" and inserting in lieu thereof the figures "20.98".

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
Attorneys for Plaintiffs,
4th Floor, Empire Building,
Des Moines, Iowa.

[fol. 20] (Answer of Defendant United States of America in Case No. 294 Civil Action.)

Filed in U. S. District Court March 31, 1944.

The defendant, Maurice F. Donegan, United States Attorney, answers the complaint, as amended, in this action as follows:

1. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

2. Admits the allegations contained in paragraphs II and III of the complaint.

3. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs IV, V, VI and VII of the complaint.

4. Admits the allegations of paragraph VIII as amended.

5. Denies the allegations contained in paragraph IX of the complaint as amended.

6. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of the complaint except that defendant admits that Griff Williams and members of his orchestra were not employees of the plaintiffs on October 13, 1940.

7. Denies the allegations contained in paragraphs XI and XII of the complaint, as amended.

8. Denies the allegations contained in paragraph 13 of the amended complaint.

Wherefore the defendant asks judgment dismissing the complaint together with costs and disbursements of this action.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant U. S. Attorney.

[fol. 21] (Motion of Griff Williams for Leave to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court May 17, 1944.

Griff Williams moves for leave to intervene as a party defendant in this action in order to assert the matters set forth in his proposed answer, of which a copy is hereto attached, on the grounds that he is the same Griff Williams mentioned in the complaint in this action; that he has a substantial interest in the subject matter of the action; that the representation of his interest by the original defendant is or may be inadequate; that he will be affected by a judgment in the action; that should the plaintiff recover in this action he would become liable to the United States Government in the amount plaintiff seeks to recover in this action, as either he or plaintiff is liable to the United States Government in the amount the plaintiff seeks to recover in this action; that his interest in the main action has questions of law and fact in common and that his intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington, D. C.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

Attorneys for Intervenor.

[fol. 22] (Order granting leave to Griff Williams to Intervene in Case No. 294 Civil Action.)

Entered in U. S. District Court June 29, 1944.

On Motion of Griff Williams, It is Ordered that he be permitted to intervene in the above entitled action.

[fol. 23] (Answer of Intervenor Griff Williams in Case No. 294 Civil Action:)

Filed in U. S. District Court September 21, 1944.

The defendant, Griff Williams, through his attorneys answers the complaint as amended in this action as follows:

1. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

2. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the complaint.

3. Admits the allegations contained in paragraph III of the complaint.

4. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the comp' int.

5. Admits the allegations of paragraph V of the complaint.

6. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VI and VII of the complaint.

7. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII as amended.

8. Denies the allegations contained in paragraph IX of the complaint as amended.

9. States in answer to the allegations contained in paragraph X that members of this orchestra were not employees of the plaintiff on the occasion of the orchestra engagement of October 13, 1940 for the plaintiff.

10. Denies the allegations contained in paragraph XI of the complaint as amended.

11. Denies the allegations contained in paragraph XII of the complaint as amended.

12. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations [fol. 24] contained in paragraph XIII of the amendment to the complaint, except that he further states that he and all members of the orchestra known as Griff Williams and his Orchestra were members in good standing of the American Federation of Musicians at all times material hereto.

Wherefore, the defendant asks judgment dismissing the complaint, together with costs and disbursements of this action.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington, D. C.

Attorneys for Intervenor.

[fol. 25] (Motion of Bill Carlsen for Leave to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 12, 1944.

Bill Carlsen moves for leave to intervene as a party defendant in this action in order to assert the matters set forth in his proposed answer, of which a copy is hereto attached, on the grounds that he is the same Bill Carlsen mentioned in the complaint in this action; that he has a substantial interest in the subject matter of the action; that the representation of his interest by the original defendant is or may be inadequate; that he will be affected by a judgment in the action; that should the plaintiff recover in this action he would become liable to the United States Government for a portion of the amount plaintiff seeks to recover in this action, as either he or plaintiff is liable to the United States Government in the amount the plaintiff seeks to recover in this action; that his interest in the main action has questions of law and fact in common and that his intervention will not to any extent delay

or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington, D. C.

Attorneys for Intervenor.

[fol. 26] (Order granting leave to Bill Carlsen to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

Upon consideration of the motion of Bill Carlsen to intervene herein as a party defendant and the Court having considered said motion and the answer rendered therewith and it appearing to the Court that the said Bill Carlsen should be permitted to intervene as prayed and the Court being duly advised in the premises;

It Is Ordered, that Bill Carlsen has leave to intervene in this cause and is hereby made a party to this cause and to that end may file instanter an answer in this cause in the same manner and with like effect as if named an original party to this cause.

By the Court

CHAS. A. DEWEY,
Justice.

[fol. 27] (Answer of Intervener Bill Carlsen in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

The defendant, Bill Carlsen, through his attorneys answers the complaint as amended in this action as follows:

1. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

2. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the complaint.

3. Admits the allegations contained in paragraph III of the complaint.

4. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the complaint.

5. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of the complaint.

[fol. 28] 6. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VI and VII of the complaint.

7. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII as amended.

8. Denies the allegations contained in paragraph IX of the complaint as amended.

9. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs X and XI of the complaint.

10. Denies the allegations contained in paragraph XII of the complaint as amended.

11. States that he has no knowledge or informtion sufficient to form a belief as to the truth of the allegations contained in paragraph XIII of the amendment to the complaint, except that he further states that he and all members of the orchestra known as Bill Carlsen and his orchestra were members in good standing of the American Federation of Musicians at all times material hereto.

Wherefore, the defendant asks judgment dismissing the complaint, together with costs and disbursements of this action.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington, D. C.

Attorneys for Intervenor.

[fol. 29] (Motion of Tiny Hill for Leave to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 12, 1944.

Tiny Hill moves for leave to intervene as a party defendant in this action in order to assert the matters set forth in his proposed answer, of which a copy is hereto attached, on the grounds that he is the same Tiny Hill mentioned in the complaint in this action; that he has a substantial interest in the subject matter of the action; that the representation of his interest by the original defendant is or may be inadequate; that he will be affected by a judgment in the action; that should the plaintiff recover in this action he would become liable to the United States Government for a portion of the amount plaintiff seeks to recover in this action, as either he or plaintiff is liable to the United States Government in the amount the plaintiff seeks to recover in this action; that his interest in the main action has questions of law and fact in common and that his intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

CHAUNCEY A. WEAVER
325 Insurance Exchange
Des Moines 9, Iowa.

JOSEPH A. PADWAY

ROBERT A. WILSON
736 Bowen Building
Washington, D. C.

Attorneys for Intervenor.

[fol. 30] (Order granting Leave to Tiny Hill to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

Upon consideration of the motion of Tiny Hill to intervene herein as a party defendant and the Court having considered said motion and the answer rendered therewith and it appearing to the Court that the said Tiny Hill should be permitted to intervene as prayed and the Court being duly advised in the premises;

It Is Ordered, that Tiny Hill has leave to intervene in this cause and is hereby made a party to this cause and to that end may file instanter an answer in this cause in the same manner and with like effect as if named an original party to this cause.

By the Court

CHAS. A. DEWEY

[fol. 31] (Answer of Intervener Tiny Hill in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

The defendant, Tiny Hill, through his attorneys answers the complaint as amended in this action as follows:

1. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

2. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the complaint.

3. Admits the allegations contained in paragraph III of the complaint.

4. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the complaint.

5. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of the complaint.

[fol. 32] 6. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VI and VII of the complaint.

7. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII as amended.

8. Denies the allegations contained in paragraph IX of the complaint as amended.

9. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs X and XI of the complaint.

10. Denies the allegations contained in paragraph XII of the complaint as amended.

11. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XIII of the amendment to the complaint, except that he further states that he and all members of the orchestra known as Tiny Hill and his orchestra were members in good standing of the American Federation of Musicians at all times material hereto.

Wherefore, the defendant asks judgment dismissing the complaint, together with costs and disbursements of this action.

CHAUNCEY A. WEAVER
325 Insurance Exchange
Des Moines 9, Iowa

JOSEPH A. PADWAY

ROBERT A. WILSON
736 Bowen Building
Washington, D. C.

Attorneys for Intervenor.

[fol. 33] (Motion of Boyd Raeburn for Leave to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 12, 1944.

Boyd Raeburn moves for leave to intervene as a party defendant in this action in order to assert the matters set

forth in his proposed answer, of which a copy is hereto attached, on the grounds that he is the same Boyd Raeburn mentioned in the complaint in this Action; that he has a substantial interest in the subject matter of the action; that the representation of his interest by the original defendant is or may be inadequate; that he will be affected by a judgment in the action; that should the plaintiff recover in this action he would become liable to the United States Government for a portion of the amount plaintiff seeks to recover in this action, as either he or plaintiff is liable to the United States Government in the amount the plaintiff seeks to recover in this action; that his interest in the main action has questions of law and fact in common and that his intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

CHAUNCEY A. WEAVER
325 Insurance Exchange
Des Moines 9, Iowa

JOSEPH A. PADWAY

ROBERT A. WILSON
736 Bowen Building
Washington, D. C.

Attorneys for Intervenor.

[fol. 34] (Order granting leave to Boyd Raeburn to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

Upon consideration of the motion of Boyd Raeburn to intervene herein as a party defendant and the Court having considered said motion and the answer rendered therewith and it appearing to the Court that the said Boyd Raeburn should be permitted to intervene as prayed and the Court being duly advised in the [presmies];

It Is Ordered, that Boyd Raeburn has leave to intervene in this cause and is hereby made a party to this cause and to that end may file instanter an answer in this cause in the

same manner and with like effect as if named an original party to this cause.

By the Court

CHAS. A. DEWEY,
Justice.

[fol. 35] (Answer of Intervener Boyd Raeburn in Case No. 294 Civil Action.)

Filed in U. S. District Court, September 21, 1944.

The defendant, Boyd Raeburn, through his attorneys answers the complaint as amended in this action as follows:

1. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

2. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the complaint.

3. Admits the allegations contained in paragraph III of the complaint.

4. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the complaint.

5. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of the complaint.

[fol. 36] 6. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VI and VII of the complaint.

7. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII as amended.

8. Denies the allegations contained in Paragraph IX of the complaint as amended.

9. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs X and XI of the complaint.

10. Denies the allegations contained in paragraph XII of the complaint as amended.

11. States that he has no knowledge or inforamtion sufficient to form a belief as to the truth of the allegations contained in paragraph XIII of the amendment to the complaint, except that he further states that he and all members of the orchestra known as Boyd Raeburn and his orchestra were members in good standing of the American Federation of Musicians at all times material hereto.

Wherefore, the defendant asks judgment dismissing the complaint, together with costs and disbursements of this action.

CHAUNCEY A. WEAVER
325 Insurance Exchange
Des Moines 9, Iowa

JOSEPH A. PADWAY

ROBERT A. WILSON
736 Bowen Building
Washington, D. C.

Attorneys for Intervenor.

[fol. 37] (Motion of Buddy Fisher for Leave to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 12, 1944.

Buddy Fisher moves for leave to intervene as a party defendant in this action in order to assert the matters set forth in his proposed answer, of which a copy is hereto attached, on the grounds that he is the same Buddy Fisher mentioned in the complaint in this action; that he has a substantial interest in the subject matter of the action; that the representation of his interest by the original defendant is or may be inadequate; that he will be affected by a judgment in the action; that should the plaintiff recover in this action he would become liable to the United States Government for a portion of the amount plaintiff seeks to recover in this action, as either he or plaintiff is liable to the United States Government in the amount the plaintiff seeks to recover in this action; that his interest in the main action has questions of law and fact in

common and that his intervention will not to any extent delay or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

CHAUNCEY A. WEAVER,
325 Insurance Exchange
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington, D. C.

Attorneys for Intervenor.

[fol. 38] (Order granting leave to Buddy Fisher to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

Upon consideration of the motion of Buddy Fisher to intervene herein as a party defendant and the Court having considered said motion and the answer rendered therewith and it appearing to the Court that the said Buddy Fisher should be permitted to intervene as prayed and the Court being duly advised in the premises;

It Is Ordered, that Buddy Fisher has leave to intervene in this cause and is hereby made a party to this cause and to that end may file instanter an answer in this cause in the same manner and with like effect as if named an original party to this cause.

By the Court.

CHAS. A. DEWEY,
Justice.

[fol. 39] (Answer of Intervener Buddy Fisher in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

The defendant, Buddy Fisher, through his attorneys answers the complaint as amended in this action as follows:

1. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

2. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the complaint.

3. Admits the allegations contained in paragraph III of the complaint.

4. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the complaint.

5. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of the complaint.

[fol. 40] 6. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VI and VII of the complaint.

7. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII as amended.

8. Denies the allegations contained in paragraph IX of the complaint as amended.

9. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs X and XI of the complaint.

10. Denies the allegations contained in paragraph XII of the complaint as amended.

11. States that he [as] no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XIII of the amendment to the complaint, except that he further states that he and all members of the orchestra known as Buddy Fisher and his orchestra were members in good standing of the American Federation of Musicians at all times material hereto.

Wherefore, the defendant asks judgment dismissing the complaint, together with costs and disbursements of this action.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington, D. C.

Attorneys for Intervenor.

[fol. 41] (Motion of Paul Moorhead for Leave to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 12, 1944.

Paul Moorhead moves for leave to intervene as a party defendant in this action in order to assert the matters set forth in his proposed answer, of which a copy is hereto attached, on the grounds that he is the same Paul Moorhead mentioned in the complaint in this action; that he has a substantial interest in the subject matter of the action; that the representation of his interest by the original defendant is or may be inadequate; that he will be affected by a judgment in the action; that should the plaintiff recover in this action he would become liable to the United States Government for a portion of the amount plaintiff seeks to recover in this action, as either he or plaintiff is liable to the United States Government in the amount the plaintiff seeks to recover in this action; that his interest in the main action has questions of law and fact in common and that his intervention will not to any extent delay

or prejudice the adjudication of the rights of the original parties.

Respectfully submitted,

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington, D. C.

Attorneys for Intervenor.

[fol. 42] (Order granting Leave to Paul Moorhead to Intervene in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

Upon consideration of the motion of Paul Moorhead to intervene herein as a party defendant and the Court having considered said motion and the answer rendered therewith and it appearing to the Court that the said Paul Moorhead should be permitted to intervene as prayed and the Court being duly advised in the premises;

It Is Ordered, that Paul Moorhead has leave to intervene in this cause and is hereby made a party to this cause and to that end may file instanter an answer in this cause in the same manner and with like effect as if named an original party to this cause.

By the Court.

CHAS. A. DEWEY,
Justice.

[fol. 43] (Answer of Intervener Paul Moorhead in Case No. 294 Civil Action.)

Filed in U. S. District Court September 21, 1944.

The defendant, Paul Moorhead, through his attorneys answers the complaint as amended in this action as follows:

1. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

2. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the complaint.

3. Admits the allegations contained in paragraph III of the complaint.

4. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the complaint.

5. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of the complaint.

[fol. 44] 6. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VI and VII of the complaint.

7. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII as amended.

8. Denies the allegations contained in paragraph IX of the complaint as amended.

9. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs X and XI of the complaint.

10. Denies the allegations contained in paragraph XII of the complaint as amended.

11. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XIII of the amendment to the complaint, except that he further states that he and all members of the orchestra known as Paul Moorhead and his orchestra were members in good standing of the American Federation of Musicians at all times material hereto.

Wherefore, the defendant asks judgment dismissing the complaint, together with costs and disbursements of this action.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington, D. C.

Attorneys for Intervenor.

[fol. 45] Be It Remembered, That on the 20th day of July, A. D. 1944, there was filed in the District Court of the United States for the Southern District of Iowa, Central Division, a Complaint in the case of Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, Plaintiffs, vs. E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant, which case was numbered 328 Civil Action, Central Division, said complaint being in words and figures as follows:

[fol. 46] Complaint.

In the District Court of the United States in and for the Southern District of Iowa, Central Division.

Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, Plaintiffs,
No. 328. vs. Civil Action.
E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant.

Plaintiffs for their cause of action allege:

I.

Plaintiffs are residents and citizens of Iowa, engaged in business in the City of Fort Dodge, Iowa, as a partnership doing business under the name of the Larry Geer Ballrooms.

II.

At all times mentioned herein the Defendant was and still is the duly appointed, qualified and acting Collector of Internal Revenue of the United States of America for the District of Iowa.

III.

This action arises under the acts of Congress known as the Federal Insurance Contributions Act, approved February 10, 1939, as Subchapter A of Chapter 9 of the Internal Revenue Code (53 Stat. 175), and the Federal Unemployment Tax Act, approved February 10, 1939, as Subchapter C of Chapter 9 of the Internal Revenue Code, (53 Stat. 193).

[fol. 47] IV.

That during the years 1941 and 1942, the Plaintiffs operated ballrooms in Fort Dodge, Storm Lake and North of Rockwell City, Iowa, wherein were held dances for the entertainment and amusement of the public, for which an admission charge was made; that music for such dances was furnished by traveling orchestras which were permanent organizations engaged in the business of furnishing music for dance engagements for ballroom operators, fraternal and social clubs, charitable organizations, lodges, American Legion Posts, police and fire departments and college and high school classes, most of such engagements being for one evening's duration.

V.

That among such traveling orchestras which furnished dance music for engagements at Plaintiffs' ballrooms were certain orchestras whose names and dates of engagements are as follows:

Name	Dates of Engagements
Al Menke and His Orchestra	October 12 and 18, 1941, November 8 and 26, 1941, and November 26, 1942.

Les Hartman and His Orchestra	February 5, March 5, April 2, May 7, June 4, July 2, August 6, September 3 and October 1, all in 1942.
Jimmy Barnett and His Orchestra	January 1, 5, and 24, April 25, June 16, July 2, 3, and 4, August 1 and 8, September 12, October 4, November 7, 14, 15 and 17, December 5, 6 and 22, all in 1942.
Paul Moorhead and His Orchestra	February 17 and 22, March 21 and 22, April 18, May 2, 9, 16, 28 and 31, June 2 and 30, July 11, 12, 14 and 16, October 10, 11, 12 and 24, all in 1942.
Blue Barron and His Orchestra	August 26, 1941, and July 4, 5 and 9, 1942.

[fol. 48]

Doc Lawson and His Orchestra	July 4, 1942.

That each of the foregoing engagements, except those by Al Menke and His Orchestra, Less Hartman and His Orchestra and Doc Lawson and His Orchestra were booked for the orchestra performing the same by a booking agent which the leader of such orchestra has made his exclusive representative for the purpose of booking engagements for his said orchestra, for which services such agent was paid a commission by said leader; that in order to secure each of the orchestras hereinabove mentioned for each of its said engagements, Plaintiffs were required to excute a printed form of contract identical to that contained in the contract of which Exhibit "A" attached hereto is a copy.

VI.

That in the year 1943, an agent of the Defendant's office examined the books and records of Plaintiffs and there-

after prepared, on Plaintiffs' behalf, amended returns reporting payments made for the services of the orchestras named in the preceding paragraph and also certain other orchestras which had performed engagements at Plaintiffs' ballrooms during the years 1941 and 1942; that Plaintiffs signed said amended returns under protest, stating to said agent that all of the payments to the orchestras listed therein were made to the leaders thereof as independent contractors and not to such leaders and the sidemen of their respective orchestras as employees of Plaintiffs; that said returns were then filed by said agent with the Defendant.

VII.

That Defendant thereafter, upon the amended returns so filed by his agent, assessed Plaintiffs additional taxes and interest under said Federal Insurance Contributions [fol. 49] Act in the aggregate sum of $378.13, and additional taxes and interest under said Federal Unemployment Tax Act in the aggregate sum of $516.75, and on or about July 24, 1943, served upon Plaintiffs notice and demand for the payment of said taxes; that Plaintiffs, in order to avoid penalties and distraint of their property, paid to Defendant on or about August 4, 1943, the two sums aforementioned. That the employee's tax in said payment of $378.13 Federal Insurance Contributions Tax and interest was not withheld by Plaintiffs from any sums paid said orchestras, but was paid by Plaintiffs from their own personal funds.

VIII.

That on or about October 24, 1943, Plaintiffs filed with the Collector of Internal Revenue at Des Moines, Iowa, on Form 843, claims for refund of both amounts of said taxes paid Defendant as set forth in the preceding paragraph of this complaint; that in a letter dated February 7, 1944, the then Acting Commissioner of Internal Revenue notified the Plaintiffs that said claims for refund were thereby disallowed.

IX.

That Plaintiffs are enttled to have refunded to them that part of said taxes paid with respect to sums paid for the services of the orchestras listed in Paragraph V of this complaint for the reason that Plaintiffs were not the em-

ployers of the leader and members of any of such orchestras within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act on the occasion of its engagements for Plaintiffs at one of their ballrooms and, hence, no taxes thereunder were due from the Plaintiffs with respect to the sum of money which they paid for the services of said orchestra in performing said engagement; that the leader of each of such orchestras [fol. 50] was an independent contractor and he, and not Plaintiffs, was the employer of the members of any orchestra for the purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, and solely responsible for the taxes imposed by each of those enactments with respect to the sums of money received by the members of his orchestra for their services in performing each of its engagements at one of Plaintiffs' ballrooms; that the amount of Federal Insurance Contributions paid by Plaintiffs on sums paid for the services of said orchestras was $160.44, and the amount of Federal Unemployment Tax paid for such service was $240.64.

X.

That the leader of each of the orchestras mentioned in Paragraph V of this complaint, on the occasion of each of its engagements at one of Plaintiffs' ballrooms, was an independent contractor and the employer of the members of his orchestra for the reasons that he was engaged in an independent business for profit, and he alone, and not Plaintiffs,

(1) Hired and discharged the members of his orchestra and determined the cause therefor.

(2) Had the right to control the details and manner of the performances of the orchestra members and exercised such control in that he:

(a) dictated the style of music, length and tempo, volume, selections and time for feature performances.

(b) determined the instrumentation.

(c) determined the attire of the members.

(d) either provided or arranged for the transportation of the members to and from said engagement.

(e) told the members where and when to report for the [fol. 51] performance of the engagement.

(f) determined the time and place of rehearsals and numbers to be rehearsed, and at such rehearsals directed the members in their efforts to produce the type of music which he desired the orchestra to play.

(g) determined placing of musicians on the bandstand.

(h) selected and compiled the music library from which the dance pieces were played.

(i) saw to it that the orchestra, in the rendition of its services, carried out his ideas of showmanship and the type and style of music to be played.

(3) Determined the time, place and amount of payment of the compensation of such members and was liable to the members of his orchestra for such compensation, irrespective of whether he received the contract price for said engagement.

That Plaintiffs, in executing the contracts for each of said orchestras, were not concerned with and did not know, the names of the members of such orchestras or the amounts of compensation received by them; that Plaintiffs were familiar with the reputation and special quality of music of said orchestras and relied on the leader of each to furnish an organization composed of musicians selected, rehearsed and capable of performing such quality of music.

XI.

That although each of said contracts purports to create the relationship of employer and employee between Plain- [fol. 52] tiffs and the orchestra leader and the members of the orchestra named therein, it did not and could not have that effect for the following reasons:

(1) Plaintiffs and said orchestra leader and the members of his orchestra could not change their true relation, as shown by the actual facts, through mere nomenclature and artful language in a written contract, particularly where such contract represents a skillful, painstaking and ingenious attempt to avoid liability for taxes imposed by legislative enactment; that the form of contract of which Exhibit "A" attached hereto is a copy is such a contract,

having been prepared by the American Federation of Musicians for the express purpose of endeavoring to shift the responsibility for the payment of Social Security and employment taxes from the leaders or owners of the orchestras, as the actual employers of its members, to the person engaging such orchestra's services; that such purpose is shown not only by the terms of the contract itself, but also by the contents of a notice given to all locals of the American Federation of Musicians on May 1, 1941, and signed by James C. Petrillo and Fred W. Birnbach, President and Secretary respectively of such Federation, a copy of which notice is attached hereto marked Exhibit "B" and by this reference made a part hereof.

(2) Under Section 29 of Article X of the By-laws of the American Federation of Musicians in effect during the year 1941 and at all times since 1941, which by-laws are made a part of said contract by an express provision therein, the sidemen in said leader's orchestra, as members of such Federation, were prohibited under penalty of expulsion from said Union from accepting engagements with Plaintiffs and hence no relationship of employer and employee could exist between Plaintiffs and said sidemen. A true copy of Section 29 of Article X of said By-laws is attached hereto, marked Exhibit "C" and by this reference [fol. 53] made a part hereof.

(3) The members of the orchestra are not described in said contract with sufficient certainty to make them parties thereto.

(4) The provision in said contract purporting to vest control of the orchestras' services in Plaintiffs is so indefinite that unless it be considered as referring to control over results to be accomplished under the contract, the provision is utterly meaningless and of no effect whatever.

(5) That in the case of each said contract negotiated by a booking agency, said contract was used by such agency, the orchestra leader named therein and Plaintiffs for the purpose of remaining in good standing with the American Federation of Musicians, and not for the purpose of reflecting actual facts pertaining to the engagement.

(6) That said contract was not executed by the sidemen of the orchestra named therein or any agent authorized by such sidemen to execute the same for them; that none of said sidemen ever authorized anyone, either orally or by power of attorney as required by Section 48 of Article X of the By-laws of the American Federation of Musicians, to accept such contract for them, which By-law made a part of said contract by an express provision therein recites:

"Members of the American Federation of Musicians who accept engagements for bands or orchestras must in person sign their contracts for same or give some agent power of attorney to sign their names."

XII.

That Al Menke, Jimmy Barnett and Blue Barron were each an independent contractor and the employer of the members of their respective orchestras on the occasion of each of said orchestra's engagements at Plaintiffs' ballrooms for the further reason that each said leader assumed [fol. 54] the responsibility for the payment of all taxes imposed by the Federal Insurance Contributions Act and the Federal Unemployment Tax Act with respect to the sums paid the members of his orchestra for their services in performing such engagements, and each said leader actually paid to a Collector of Internal Revenue the amount of such taxes.

Wherefore, Plaintiffs demand judgment against the Defendant in the sum of $401.18, together with interest at the rate of 6% per annum from and after the 4th day of August, 1943, and the costs and such other relief as the court may decree.

THOMAS B. ROBERTS
CLYDE B. CHARLTON
Attorneys for Plaintiffs,
4th Floor, Empire Building
Des Moines, Iowa

[fol. 55] Exhibit "A"

Contract Blank

American Federation Of Musicians

Local No. 477

This Contract for the personal services of musicians, made this 23rd day of November, 1942 between the undersigned employer (hereinafter called the employer) and 13 musicians (hereinafter called employees) representd by (including Leader)
the undersigned representative.

Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Al Menke, according to the following terms and conditions:

Name and Address of Place of Engagement Laramar Ballroom, Ft. Dodge, Iowa

Date(s) of Employment Thursday Nov. 26th, 1942

Hours of Employment 9 P M to.....

Price Agreed Upon $250.00
(Terms and Amount)

To be paid after engagement
(Specify When Payments Are to be Made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not

perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

[fol. 56] The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Larry Geer

Street Address.....

City or State Ft. Dodge Iowa

Phone.....

Accepted by Employer Larry Geer

Accepted Al Menke
(Orchestra Leader)

By /s/ Al Menke
(Representatives of Employees)

Form B

[fol. 57] Exhibit "B"

To All Locals of the
American Federation of Musicians:

Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with grand opera companies and symphony orchestras.

This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the Social Security Laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

This contract and none other must be used on all such engagements on and after June 1, 1941. Any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for said violation. All engagements booked by licensed agencies must be contracted on these forms.

A supply of these contracts may be secured from the International Secretary's Office.

Kindly be governed accordingly.

Fraternally yours,

JAMES C. PETRILLO,
President, A. F. of M.

Attest:
FRED W. BIRNBACH,
Secretary, A. F. of M.

[fol. 58] Exhibit "C"

Section 29 of Article X of By-laws of American Federation of Musicians of the United States and Canada:

"Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the

agents of such to whom the band or orchestra is furnished, provided that in states or provinces where laws exist, which prescribe a different method of contracting, or where the provisions of law are such that to contract as above prescribed would be contrary to the interests of members, Locals are authorized to establish such method of contracting as may best conserve the interest to members. However, members may accept engagements from traveling theatre company managements direct, provided their contract, in addition to the signatures of the contracting parties, is countersigned by the musical director of the company or the member of the Federation who engages the members for the company. Furthermore, members may contract with symphony orchestra management direct in conformity with all Local and Federation Laws.

"If a member violates the above, such action shall constitute his resignation from membership in such Locals where he held membership, and in the American Federation of Musicians."

[fol. 59] (Answer of Defendant United States of America in Case No. 328 Civil Action.)

Filed in U. S. District Court August 29, 1944.

The defendant, by Maurice F. Donegan, United States Attorney, answers the complaint in this action as follows:

1. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

2. Admits the allegations contained in paragraphs II and III of the complaint.

3. States that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs IV and V of the complaint.

4. Admits the allegations contained in paragraph VI of the complaint.

5. Admits the allegations contained in paragraph VII of the complaint except the last sentence thereof, and as to that allegation, defendant states that he has no knowledge

or information sufficient to form a belief as to the truth thereof.

6. Admits the allegations contained in paragraph VIII of the complaint.

7. Denies the allegations contained in paragraphs IX, X, XI and XII of the complaint.

Wherefore defendant asks judgment dismissing the complaint together with costs of this action.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant U. S. Attorney.

[fol. 60] (Order of District Court consolidating Civil Actions Nos. 249 and 328 for purpose of Trial, etc.)

Entered in U. S. District Court November 28, 1944.

It is Ordered that the above entitled actions be and the same are consolidated for the purpose of trial.

[fol. 62] (Transcript of Evidence and Proceedings in Civil Actions Nos. 294 and 328.)

Filed in U. S. District Court May 19, 1945.

In the United States District Court for the Southern District of Iowa, Central Division.

Roy E. Bartels, et al., d.b.a., Crystal Ballroom,
Plaintiffs,
No. 294 vs. Civ. Act.
E. H. Birmingham, Individually and as Collector of Internal Revenue, Defendant.

Bill Carlsen, Tiny Hill, Paul Moorhead, Griff Williams and Boyd Raeburn, Interveners,

and

Larry V. Geer and Margaret Geer, d.b.a., Larry Geer Ballrooms, Plaintiffs,
No. 328 vs. Civ. Act.
E. H. Birmingham, etc., Defendant.

Appearances:

Tom B. Roberts and Clyde B. Charlton, Attorneys for plaintiffs.

Maurice F. Donegan, District Attorney, C. I. Level, Assistant District Attorney, Harold D. Cohen, Special Assistant Attorney General, Attorneys for defendant.

Joseph A. Padway, Chauncey A. Weaver, Robert W. Wilson, Attorneys for Interveners.

Case called for trial upon its merits before Hon. Chas. A. Dewey, Judge, beginning at 11:00 a.m., December 11, 1944, both above cases being consolidated for trial.

Reported by

VERNON L. GRANT,
HARRY E. BEACH,
Official Shorthand Reporters.

[fol. 66] Morning Session—Monday, December 11, 1944.
11:00 o'clock.

The Court: The cases will be ordered consolidated for trial. I notice you have a reporter here, and it appearing to the court that this is a case which should be stenographically reported, Vernon L. Grant and Harry E. Beach are hereby appointed official Reporters to take down the evidence of the witnesses in shorthand, under the local rules of this court. All right, you may proceed.

* * * * * * *

[fol. 97] Monday, December 11, 1944,
Afternoon Session, 2:00 p.m.

The Court: I guess we are all here. You may proceed.

Roy E. Bartels, plaintiff, called as a witness on his own behalf, and being first duly sworn by the Clerk, testified as follows:

Direct Examination.

By Mr. Roberts:

Q. Will you give your name to the reporter?

A. Roy E. Bartels.
Q. Where do you live, Mr. Bartels?
A. Dubuque, Iowa.
Q. You are one of the plaintiffs in this case?
A. Yes, sir.
Q. Are you and the other plaintiffs partners?
A. Yes, sir.
Q. What business is the partnership engaged in?
A. Operation of the Crystal Ballroom, dancing.
Q. Where is that? A. At Dubuque, Iowa.
Q. How long has the partnership been engaged in that business?
[fol. 98] A. Since 1934.
Q. Who manages the ballroom for the partnership?
A. I do.
Q. How long have you been such manager?
A. Since 1934.
Q. Do any of the other partners actively participate in the management of the ballroom?
A. I consult them, but I am the manager.
Q. Just tell what your duties were during the years 1940, '41 and '42.
A. One of the duties was to secure orchestras, take care of the duties generally of running the ballroom.
Q. You were the only one that did that for the partnership? A. Yes, sir.
Q. Just tell the court, you mentioned something about dances, how often were those dances held during those years?
A. They were held on an average of once a week; some times in the holidays they would be more. We have one exception, we do not operate in the advent of Lent.
Q. Who could attend these dances?
A. Any respectable citizen. It was a public dance, upon the payment of their fees, the admission.
Q. About how many patrons could you accommodate there? A. About 1250.
[fol. 99] Q. That would be a capacity crowd?
A. Yes, that would be.
Q. Now do these dances require some kind of music?
A. Yes.
Q. What kind? A. Dance music that would be.
Q. Who furnishes it?

A. Well, it is always bands. We never had the same band, that is, I mean we operate one night, one week we will have one orchestra and another week we have a different orchestra, different orchestras.

Q. Do you use what is commonly known as a house band? A. No, sir.

Q. Just tell the court what a house band is.

A. Well a House Band would be a band that would play night after night in rotation on the premises as the band of the establishment.

Q. What can you tell the court as to whether one of the orchestras just furnished music for dances at the Crystal Ballroom was Griff Williams and his orchestra?

A. Yes, it was.

Q. Can you recall when those engagements were?

A. Well, there was one we had, one September 1, 1941, and we had another engagement in the month of November, [fol. 100] 1940.

Mr. Roberts: If the court please, I will have to see the original contracts. They were made a part of the deposition of Griff Williams in Chicago.

Mr. Padway: We have no objection to your using the photostatic copies.

Mr. Roberts: I believe I can use these all right.

Q. I will hand you now, Mr. Bartels what has been marked exhibit, Plaintiffs' Exhibit A, attached to the deposition of Griff E. Williams, and ask you to examine that document and ask you if your signature appears any place thereon? A. Yes, it does.

Q. Just tell the court what that document is?

A. That is a contract with the Music Corporation of America and Griff Williams' Orchestra to appear at the Crystal Ballroom on October 13, 1940.

Mr. Cohen: Now if the court please, I want to object to this line of questioning and to move that the answer be stricken on the ground that any testimony of prior engagements other than the one in issue is not material or relevant to the issues in this case.

The Court: Oh, we always have to have a little background or scenery. I don't want to go too much out on a

limb, but I think this will be all right for background. Over-
[fol. 101] ruled. I appreciate your trying to hold it down. We want to do that if we can. (Defendant excepts).

Q. I call your attention to another document in the same deposition which has been marked exhibit, Plaintiffs' Exhibit B, and ask you to examine it and tell the court if your signature appears any place on that document?

A. Yes, it does.

Q. And what is that document?

A. That is another contract with the Music Corporation of America for the appearance of Griff Williams at the Crystal Ballroom, September 1, 1941.

Q. Now prior to the execution of the contract marked Exhibit B, did you have a conversation with anyone representing the Music Corporation of America?

A. Yes, I did.

Q. And who was that with?

A. That would be Jim Breyley.

Q. Is that the same Breyley that had to do with the execution of that contract Exhibit B?

A. Yes, that would be the same; yes.

Q. Just tell the court what was said by Mr. Breyley and what was said by you.

A. Well, Mr. Breyley had contacted me and told me he
[fol. 102] had a date which I could use, and he needed on Griff Williams' Orchestra, and we talked it over and he set a price, and I agreed to it, on the advance, I think I talked with Mr. Breyley on that.

Q. Incidentally just tell the court who the Music Corporation is?

A. They are booking agents for these various named orchestras.

Q. What conversation, if any, did you have with Williams prior to the time, or at the time of the signing of the contract Exhibit B? A. Well, I objected—

Q. No, I am speaking of Griff Williams. Did you have any contact with him? A. No.

Q. Did you have any contact with any of the sidemen?

A. No, sir.

Q. Of Griff Williams Orchestra? A. No.

Q. That is prior to or at the time of the signing of—

A. No, sir.

Q. — the contract. Now you mentioned something about an objection, did you have a conversation with somebody about that?

A. I had a conversation with Jim Breyley.

[fol. 103] Q. And just state what was said in that conversation?

A. I objected to the form of his contract.

Q. And did you say anything further?

A. Well, I told him I wouldn't sign this type of contract.

Q. What, if anything, did Mr. Breyley say?

A. So he said either I sign this contract or I didn't get this orchestra.

Q. Did he say anything further as to why you could not get the orchestra?

A. Well, this Union, when they had a call it came from the Musicians Union.

Q. Incidentally, the date of the contract is what?

A. The date of the contract as made is July 26, 1941.

Q. What can you tell the court, whether this is one of the first Form B contracts that you have seen?

A. That's right, that was one of the first contracts.

Q. You recognize that as a Form B contract?

A. That is right.

Q. In fact there is "Form B" printed on the bottom?

A. On the lower left-hand corner.

Q. Now what can you tell the court as to whether or not at any time during the negotiations leading up to the execution of the contract marked Exhibit B, either A or B, did you know as to the identify of the side men of Griff

[fol. 104] Williams Orchestra?

A. No, I never knew any of the side men.

Q. Did you, during the playing of their engagements, either engagements mentioned of this orchestra, learn the identity of any of the side men? A. No.

Q. Now prior to the execution of the contract marked Exhibit B, what can you tell the court as to whether you were familiar with the style of Griff Williams' music?

A. Yes, I was familiar with his style of music.

Q. How did you become familiar with it?

A. Well, through the publicity set out by his booking agents. He had appeared at the ballroom once before or twice, he also appeared at various other ballrooms around the immediate—within twenty to twenty-five miles, and his

programs over the air from these different big hotels in Chicago and establishments.

Q. What purpose did you have in securing Griff Williams and his orchestra for the second engagement?

A. Well, to render the music for the dance.

Q. In his particular style?

A. Yes, it would be his style of music.

Q. On whom, if anyone, did you rely to bring you an orchestra that would furnish that particular style?

[fol. 105] A. Griff Williams.

Q. Can you tell the court how many side men participated in that engagement of September 1, 1941?

A. Thirteen.

Q. What, if anything, did you have to do with determining the number? A. None.

Q. That is, you had nothing to do with the determining of the number? A. No, sir.

Mr. Padway: Well, I don't want to object to this, but I think the best evidence is the contract, it speaks for itself, and the parties designate the number and the court will conclude then who determines it and what it was determined on, the contract put it around thirteen men, that is in there, then the evidence, if it is in there, that is conclusive.

The Court: Overruled: (Interveners except).

Q. What, if anything, did you have to do, Mr. Bartels, with the arranging for the transportation of Griff Williams and his orchestra to Dubuque for either one of these engagements? A. Nothing. Nothing.

Q. Do you recall whether the members of Griff Wil-

[fol. 106] liams' Orchestra were in uniform on the occasion of either one of these engagements?

A. They were.

Q. Who provided those uniforms, do you know?

A. That I don't know.

Q. Did you have anything to do with that?

A. No, sir.

Q. Did you at any time or prior to—did you at any time prior to, or particularly each engagement, have any conversation with Williams with reference to the attire of his side men? A. No, sir.

Q. Did you have any conversation with any of his side men during each engagement or prior thereto with reference to their particular attire? A. No, sir.

Q. What can you tell the court as to whether or not you have any rule, house rule at the Crystal Ballroom as to how orchestras are to dress while appearing there?

A. We have no rule whatever.

Q. That is, you never have had? A. No.

Q. That is, you never have had? A. No.

[fol. 107] Q. Can you tell the court where Griff Williams sat during the engagement?

A. On the bandstand.

Q. That is, of course, in the ballroom? A. Yes, sir.

Q. What, if anything, did you observe as to the manner in which the musicians were seated on the band stand?

A. Oh, they were arranged according to their different sections in the band. Griff Williams and his band, I don't know, some of the members moved the piano down to the front of the stage where he was, right on the front of the patrons, the dancers.

Q. What, if anything, did you have to do with this seating arrangement, or the arrangement of the instruments? A. Nothing at all.

Q. Now I presume the members of the orchestra used something to produce music on the occasion of your engagement?

A. Well, they used their musical instruments.

Q. What if any of these instruments did you provide?

A. Nothing outside of the piano.

Q. And that is the piano that is mentioned that was moved down in front? A. Yes, sir.

Q. What, if anything, did you observe regarding Wil-

[fol. 108] liams use of the band during the performance of these engagements?

A. Well, Williams would—oh, what you call it—he would hit possibly two or three bars on his piano, on the piano, that would be what you call the kick-off, and then he would pick up his baton, or his stick, and he would slide gracefully across in front of the orchestra directing them.

Q. What, if anything, did you say to Williams prior to or during each engagement with reference to instrumentation of his orchestra? A. Nothing.

Q. What conversation did you ever have with any of his side men during their engagement with reference to his instrument or the manner of playing it?

A. Not anything.

Q. Never had any conversation with him respecting that matter? A. No, sir.

Q. Now, Mr. Bartels, just tell the court what oral instructions, if any, you ever gave Griff Williams on the occasion of each engagement of his orchestra regarding the style of music to be played?

A. Now there was nothing at all, no instruction.

[fol. 109] Q. Any instructions as to faster or slower pieces? A. No.

Q. Greater or less volume? A. No.

Q. Selections to be played? A. No.

Q. Did you ever give any oral instructions to the side men respecting any of those matters? A. No, sir.

Q. That is to the style of music or the tempo or the pieces to be played? A. No.

Q. No instructions on those? A. No.

Q. What can you tell the court as to whether Williams had some feature side men?

A. He may have had some side men there with him that sang.

Q. They would play a chorus part by themselves, is that right?

A. Well, they possibly would sing a chorus of some parts.

Q. Did you tell them when to do that? A. No.

Q. What written orders or instructions, if any, did you ever give Griff Williams on the occasion of either engage-

[fol. 110] ment of his orchestra with reference to such style of music, tempo, pieces to be played, greater or less volume? A. None.

Q. Who did you observe that gave directions to the orchestra respecting those matters? A. Griff Williams?

Q. That was true on both occasions? A. Yes, sir.

Q. Do you recall whether the orchestra in playing their engagements used a public address system?

A. Yes, they did.

Q. Was that yours? A. No, sir.

Q. Who supplied it, do you know?

A. The orchestra.

Q. What can you tell us as to whether or not the orchestra used any music racks during the playing of each engagement? A. Yes, they did.

Q. Did you provide those? A. No, sir.

Q. State who supplied them, if you know?

A. The orchestra supplied them.

Q. By the orchestra, who do you mean?

A. Griff Williams.

[fol. 111] Q. State whether or not you ever told Williams or any member of his orchestra while the orchestra was at the Crystal Ballroom, the route to use in reaching and leaving the band stand? A. No.

Q. Gave no instructions of that kind? A. No, sir.

Q. What can you tell the court as to whether it is customary for an orchestra during the playing of an engagement to take an intermission? A. It is.

Q. Is there anything in the By-Laws about that, of the Musicians Union?

A. I believe they are entitled to a twenty minutes intermission on every four hour job.

Q. And these were all four hour jobs?

A. All four hour jobs, yes.

Q. Do you recall any of them running over that time?

A. No.

Q. That was the time specified? A. That is right.

Q. And none of them played over that time?

A. No, sir.

Q. That is on neither occasion did either orchestra play [fol. 112] over the time in the contract? A. No, sir.

Q. What can you tell us as to whether Williams' Orchestra took an intermission during each engagement?

A. They did.

Q. Did you tell them when to take it?

A. No, I did not.

Q. What orders, if any, did you give Williams relative to the conduct of his side men during the intermission?

A. I gave him no orders.

Q. Did you have a special room at the ballroom where they could retire during the intermission? A. No, sir.

Q. No such special room? A. No.

Q. Did you give the side men themselves any orders as to their conduct during the intermission? A. No, sir.

Q. Now, what, if anything, was in the music racks during the playing of each engagement?

A. Why, there would be music.

Q. That is, some kind of sheet music?

A. Sheet music of some kind.

Q. Did you own a musical library? A. No, sir.

[fol. 113] Q. Are you a musician yourself?

A. No, sir.

Q. Can you prepare a musical arrangement?

A. No, sir.

Q. Do you know who furnished the music that appeared on the rack? A. Griff Williams.

Q. You had nothing to do with it?

A. No, sir.

Q. Now you mentioned something as to what—withdraw that. What instruction, if any, did you give Griff Williams or the members of his orchestra on each occasion when they were at the Crystal Ballroom with reference to rehearsals?

A. I gave them no instruction on rehearsals.

Q. No conversation at all on that?

A. No, sir. No, sir.

Q. Now you have mentioned something about seeing Griff Williams in front of the orchestra and what he did. What can you tell us as to who told the orchestra when to begin and when to stop?

A. The contract says—

Q. No, I mean in the actual playing.

A. Well, I had nothing to do with that at all.

[fol. 114] Q. Who did?

A. Griff Williams would start his orchestra and stop it.

Q. You saw him do that? A. Well—

Q. You observed him doing that? A. Well, sure.

Q. What can you tell the court as to whether Griff Williams came to you prior to the playing of each engagement and ask you what pieces you wanted him to play during the dance?

A. No, he never came to me.

Q. Did you at any time on the occasion of either engagement, state to him "Mix them up, Griff"?

A. No.

Q. Now with reference to these various matters that we have inquired into concerning which you testified, you gave

no instruction or direction, can you tell the court why that was that you gave no instructions?

A. Well, I myself never got inside of the ballroom until after ten o'clock in the evening, any night, because we are approximately, oh, one mile from bus service, and we provided our own bus service to the ballroom, which I personally oversaw in the early hours, and therefore we gave that service from eight to ten o'clock in the evening, and I am [fol. 115] never inside of the ballroom until after that. I may go out in the afternoon around four, and just look the place over and then around 7:30 I go on the other work.

Q. What, if anything, did you believe as to your right to give instructions?

Mr. Padway: Now that is objected to as incompetent, irrelevant and immaterial, as calling for the construction of a contract, a conclusion of law. I beg Your Honor's pardon. Do you arise when you make objections and address the court? I came from Milwaukee—

The Court: Well, we all have different rules.

Mr. Padway: I want to be—

The Court: My rule is just the opposite. We don't require the attorneys to rise, don't permit them to rise unless to approach the witness with an exhibit, and I would prefer that you sit for the examination of the witness, and then when you address the court we make you stand up.

Mr. Padway: I was pretty near thrown out for not rising up before a Justice, and it is a habit for me to remain sitting.

The Court: It is a little different when you address the court, we would rather you would arise.

[fol. 116] Mr. Padway: I mean on objections.

The Court: Remain sitting, yes.

Mr. Padway: I make the objection that—

The Court: I think you are sustained on that.

(Interveners except)

(Question read by the reporter.)

The Court: I cannot see how that would help. I am sustaining that as immaterial, not because of any other reason. (Plaintiffs except.)

Q. I hand you now what the reporter has marked Exhibit Q, and ask you to examine it and tell the court if your signature appears any place on the document?

A. Yes, sir.

Q. Just tell the court what that document is?

A. That is a check for a deposit on the Griff Williams' engagements, October 13, 1940.

Q. To whom is the check payable and in what amount?

A. Amount of $150, to the Music Corporation of America.

Q. I will hand you what the reporter has marked Exhibit R, and ask you to examine that exhibit and tell the court whether your name appears any place thereon?

A. It does.

Q. Just tell the court what that document is, if you know.

A. That is a check and deposit for the engagement of [fol. 117] Griff Williams on September 1, 1941.

Q. And the amount and to whom paid?

A. The amount is $125 and it was to the Music Corporation of America.

Q. State to whom the balance of the purchase price was paid to in the case of each engagement?

A. Griff Williams.

Q. And can you tell the court what those amounts were?

A. The—What was the total amount for each engagement? The total amount of the first contract was to be $300. He was paid, that is, October 13, 1940, he was paid $150 in cash. And the amount of the second contract was $350 and he would be paid $225 in cash.

Mr. Roberts: Plaintiff offers in evidence plaintiff's Exhibit Q.

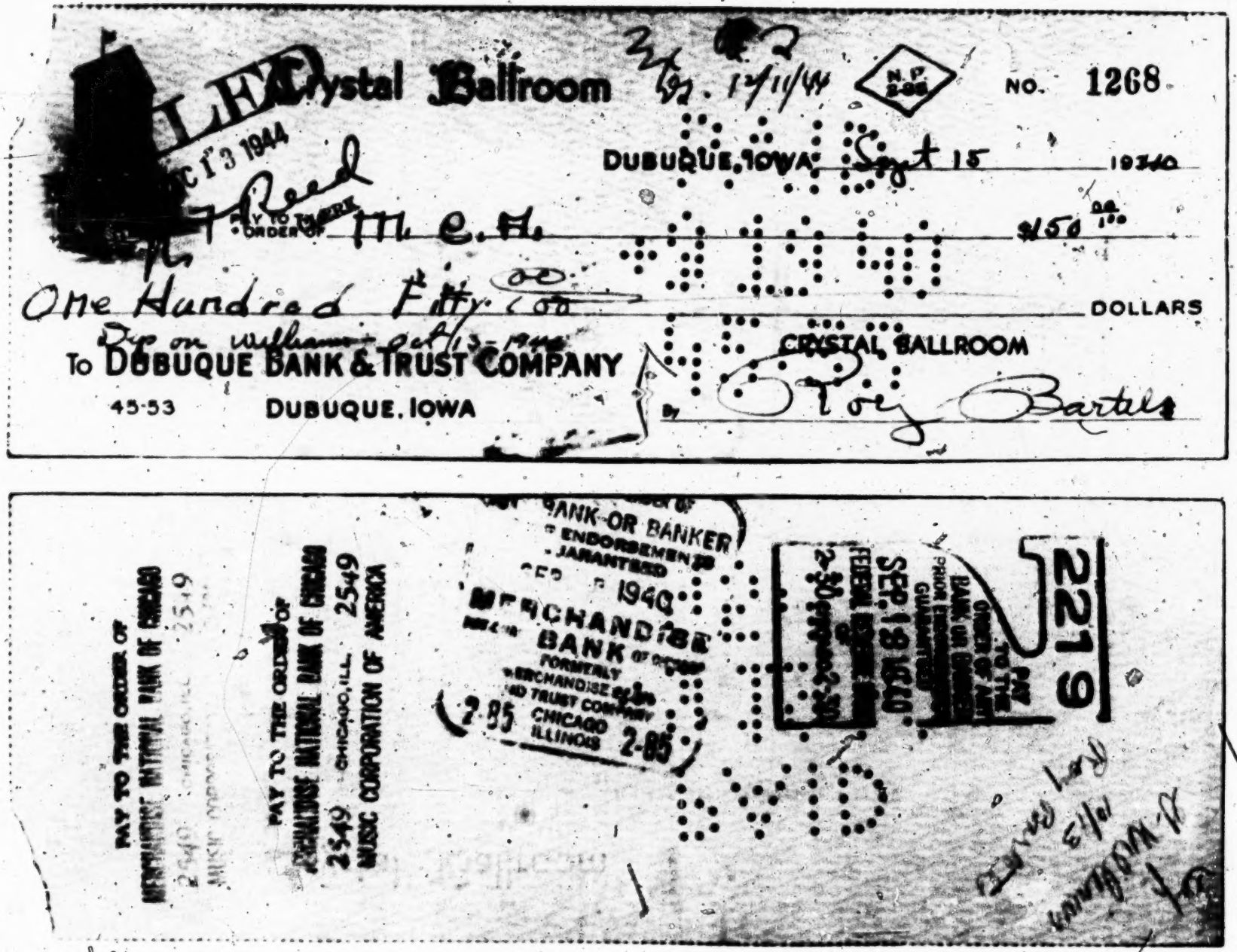
Mr. Padway: No objection.

Mr. Cohen: No objection.

Mr. Roberts: Plaintiffs offer in evidence Exhibit R.

The Court: If there is no objection they may be admitted.

Plaintiffs' Exhibit Q.
Filed in U. S. District Court December 13, 1944.



FILED
DEC 13 1944

Crystal Ballroom

12/11/44

N.P. 2-85

NO. 1268

DUBUQUE, IOWA Sept 15 1940

PAY TO THE ORDER OF M. C. H. $150 00/100

One Hundred Fifty 00/100 DOLLARS

Dep on William Oct 13-1944

To DUBUQUE BANK & TRUST COMPANY

45-53 DUBUQUE, IOWA

CRYSTAL BALLROOM

By Roy Bartels

PAY TO THE ORDER OF
MERCHANDISE NATIONAL BANK OF CHICAGO
2549 CHICAGO, ILL. 2549
MUSIC CORPORATION OF AMERICA

PAY TO THE ORDER OF
MERCHANDISE NATIONAL BANK OF CHICAGO
2549 CHICAGO, ILL. 2549
MUSIC CORPORATION OF AMERICA

BANK OR BANKER
ENDORSEMENTS
GUARANTEED
SEP 1940
MERCHANDISE
BANK
FORMERLY
MERCHANDISE
AND TRUST COMPANY
2-85 CHICAGO ILLINOIS 2-85

2219

PAY TO THE ORDER OF ANY BANK OR BANKER
PRIOR ENDORSEMENTS GUARANTEED
SEP 19 1940
FEDERAL RESERVE BANK OF CHICAGO
2-30 2-30

Roy Bartels
10/13

Filed in U. S. District Court December 13, 1944.

Crystal Ballroom

NO. 1469

Dubuque, Iowa July 28 1944

Pay to the order of M. C. A. $125.00

One Hundred Twenty Five 00/100 DOLLARS

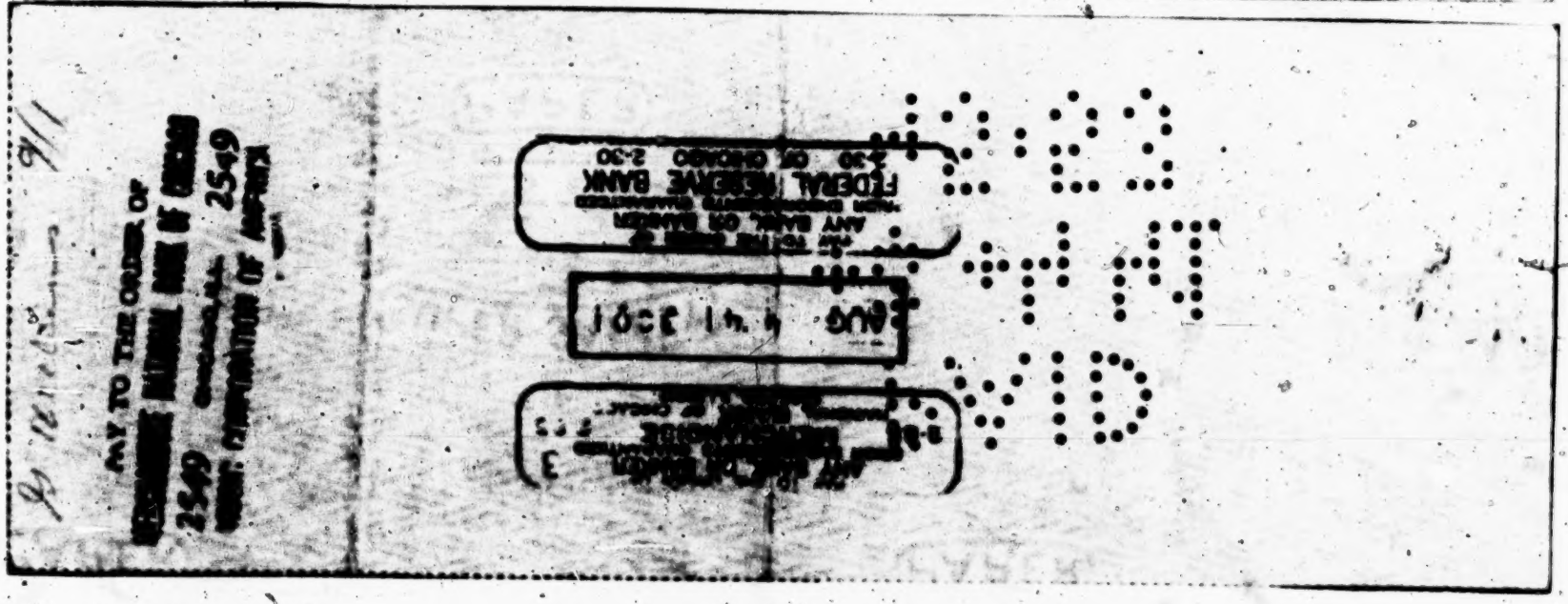
CRYSTAL BALLROOM

By Roy Bartels

TO DUBUQUE BANK & TRUST COMPANY

DUBUQUE, IOWA

45-53



[fol. 122] Q. When was the balance of the purchase price in the case of each engagement paid to,—Mr. Williams?

A. During the intermission of the night of the engagement.

Q. Do you know what Williams did with the money?

A. No, I don't. He put it in his pocket.

Q. What, if any, conversation did you have with Williams regarding the compensation of his side men for their services in playing each engagement?

A. None.

Q. Were you ever told by Williams what his side men received per each engagement?

A. No. No, sir.

Q. Well, what if any conversation did you have with any of Williams' side men with reference to his compensation for services in performing either engagement?

A. Nothing.

Q. What can you tell the court as to whether Williams ever delivered to you any written memorandum or other paper showing the amounts that were received by the side men for their services in playing each engagement?

A. No, he did not.

Q. Did anyone ever give you any memorandum or other paper with such information on it?

A. No.

[fol. 123] Q. State whether Williams ever gave you a receipt signed by the individual side men showing what each received for his services in performing either engagement?

A. No.

Q. You never received any such?

A. No, I didn't.

Mr. Cohen: Let the record show what side men, it was stated—

Q. What are side men?

A. Side men are what we call the musicians working for Griff Williams.

Mr. Padway: Now, if the court please, I know a good deal of the colloquial expressions, and we know that it is not intended that he is talking in legal terms, but he says

"working for Griff Williams," and we object to that as calling for a conclusion of law. He may work with Williams and that may be calling for a conclusion of law. It is understood what he means by the witness' answer his side men are a part of the group orchestra, of the orchestra named Griff Williams and his Orchestra. I have no objection, but I think that will help.

The Court: I think anybody will understand that is what he meant to say.

Q. It is the members other than the leader, isn't that [fol. 124] correct? A. That's right.

Q. What can you tell us as to whether or not the names of Griff Williams' side men were ever carried on any pay roll of the plaintiffs? A. No.

Q. That is, they were not? A. No.

Q. Was Griff Williams ever carried on the pay roll of the plaintiffs? A. No, sir.

Q. Did you ever have a conversation with any side men of Williams Orchestra with regard to compensation of any kind? A. No, sir.

Q. Now I will ask you, Mr. Bartels, what if anything did you have to do with the selecting of any of the side men of Griff Williams' Orchestra who played each engagement at the Crystal Ballroom? A. Nothing.

Q. What conversation, if any, did you ever have with any person with reference to his becoming a member of Griff Williams' Orchestra?

A. Nothing.

[fol. 125] Q. That is, you never had any conversation with anyone about that matter? A. No.

Q. What conversation, if any, did you ever have with Williams with reference to his selecting any side men?

A. I had no conversation.

Q. Regarding that matter? A. No.

Q. What conversation, if any, did you ever have with Williams with reference to his replacing side men in his orchestra?

A. No conversation at all regarding that.

Q. What can you tell the court as to whether you ever discharged any member of Williams' Orchestra?

A. I had no right to.

Mr. Padway: Now that is objected to as incompetent, irrelevant and immaterial. We are here to hear the case, and that is a conclusion.

The Court: Yes, I think it might have been. That is what he believed. After all the contract is the intention of the parties with reference to it.

Q. Did you ever attempt to? A. No.
Q. Why didn't you attempt to?

[fol. 126] Mr. Padway: Objected to as incompetent, irrelevant and immaterial.

The Court: It is a conclusion, I guess. Why is always a dangerous word. (Plaintiffs except).

Q. State your reasons, if any, for not attempting to discharge them.

Mr. Padway: Objected to for the same reasons as previously stated.

The Court: Overruled. Answer, please. (Interveners except).

A. I had no authority to.

Mr. Padway: That answer, I move to strike out as a conclusion of law.

The Court: Yes, sustained. (Plaintiffs except). You mean you believed you had no authority to do so?

A. That's right, sir.

The Court: I won't charge you for that.

Q. What do you recall as to whether Griff Williams and the members of his orchestra did anything on the occasion of the engagement of September 1, 1941, different than what they did on the occasion of his engagement of October 13, 1940?
A. They did no different. There was no difference in the performance.
Q. Was there any differences so far as acts of Williams [fol. 127] was concerned? A. No.
Q. His acts were the same on both occasions?
A. Yes.

Q. Are you a member of the American Federation of Musicians? A. No.

Q. Incidentally, I think once or twice you mentioned the Musicians Union during the course of your examination. To what organization do you refer?

A. To the American Federation of Musicians.

Q. Are any of the plaintiffs members of the American Federation of Musicians? A. No.

Q. Can you tell us as to what the—I will withdraw that. Do you have a Local of the American Federation of Musicians at Dubuque? A. Yes, sir.

Q. That is called the Dubuque Local, is it?

A. Well, I would guess that would be the word they used.

Q. What can you tell us as to whether your Local had a minimum scale of compensation for side men during the years 1940, '41 and '42? A. They did.

Q. Can you tell the court what that was?

[fol. 128] A. $5.00 per man for a four hour job.

Q. What can you tell the court as to whether the taxes which you pay to the defendant, and which you are seeking to recover in this action includes the employe's tax imposed by the Federal Insurance Contributions Act?

A. Will you repeat that, please?

(Question read by the reporter.)

A. It does.

Q. State whether the Employes' tax was withheld from any sums paid Williams? A. No.

Q. Whose funds were used to pay that tax?

A. Crystal Ballroom.

Q. Now did you have occasion to use some other orchestras during the year 1941 and also in early 1942?

A. Yes, sir.

Q. Was one of those orchestras known as Bill Carlsen and his orchestra? A. Yes, sir.

Q. Another one Tiny Hill? A. Yes.

Q. Boyd Raeburn? A. Yes.

Q. Buddy Fisher?

[fol. 129] A. Yes.

Q. Paul Moorhead? A. Yes.

Q. I will hand you now what the reporter has marked as Exhibits S, T, U, V, and W, and ask you to examine all

of those exhibits and tell the court if your signature appears on each one? A. Yes, sir.

Q. It appears on all of them? A. Yes, sir.

Q. Just tell the court briefly what each document is, identify it, trying to save time.

Mr. Padway: Maybe you can state what it is and save time.

The Court: I don't know what there is so delicate about that. Tell him what they are presumed to be and ask him what you want.

A. They are contracts made by the booking agents engaging all these different orchestras.

The Court: One of my pet peeves. Hand a man an exhibit and ask him what it is. The Supreme Court might have trouble knowing what it is.

Mr. Padway: These are the same things all the way through.

[fol. 130] Mr. Cohen: It seems to me that in these depositions which were taken, I realize they have not been offered yet, but there has been some reference to some contracts under different letters and it may confuse us to have different marks on these, for example, you are referring to Plaintiffs' Exhibit O in here, which is the Tiny Hill contract, and you are giving it another letter.

The Court: Are these photostatic copies?

Mr. Roberts: We have photostats, Your Honor, in the deposition.

The Court: They are referred to as photostats, that would not cause confusion, would it?

Mr. Cohen: We have no objection to the authenticity of the photostat, I just didn't think the record should be encumbered by having photostats and originals of the same contract.

Mr. Roberts: If the court please, the reason we used photostats was that we didn't know whether the deposition would be here in time.

The Court: Go ahead.

Q. Just take first, plaintiffs' Exhibit S, a contract for an engagement of Tiny Hill and his orchestra at the Crystal Ballroom for September 28, 1941. A. Yes, sir.

Q. And plaintiffs' Exhibit T is a contract dated No-
[fol. 131] vember 6, 1941, for an engagement of Buddy Fisher and his orchestra on November 23, 1941?

A. Yes, sir.

Q. And Exhibit U is a contract, dated July 12, 1941, for an engagement by Bill Carlsen at the Crystal Ballroom on August 17, 1941? A. Yes, sir.

Q. And Exhibit V is a contract, dated September 25, 1941, for an engagement by Boyd Raeburn and his orchestra at the Crystal Ballroom on October 5, 1941?

A. It is.

Q. And Exhibit W is a contract, dated June 25, 1941, for an engagement of Paul Moorhead and his orchestra at the Crystal Ballroom on Sunday, January 18, 1942?

A. It is.

Q. Did you prepare any of these contracts that I have just inquired about? A. No.

Q. From whom did you receive each contract?

A. From the different orchestras booking agencies.

Q. In the case of Exhibit V that would be William Morris, Agency Booker? A. Yes, that would be.

Q. And in the case of Exhibit U that would be the
[fol. 132] Music Corporation of America? A. Yes, sir.

Q. And in the case of Exhibit T that would be Frederick Bruce Music Corporation? A. That is correct.

Q. And in case of Exhibit S, that would be Frederick Bruce Music Corporation? A. That is correct.

Q. In the case of Exhibit W that would be Dick Schroeder at Omaha? A. Yes.

Q. Did you represent the plaintiffs in handling the negotiations for each of these engagements? A. I did.

Q. Now tell the court whether any of these orchestras had ever played previously for the Crystal Ballroom, that is prior to the date specified in the contract?

A. I think most of them have, yes.

Q. What can you tell the court as to the approximate number of years Bill Carlsen had been in existence?

A. Oh, possibly eight or ten years.

Q. And that is prior to the time that they appeared at the Crystal Ballroom? A. That is right.

[fol. 133] Q. And what about Tiny Hill?

A. Oh, he had been operating for fourteen years.

Q. What about Boyd Raeburn?

A. Boyd, I don't know how long he had been operating, but quite some time.

Q. What about Buddy Fisher?

A. Buddy, Buddy had an orchestra away a long back, I don't know.

Q. Several years prior to the time he played for the Crystal Ballroom? A. Yes.

Q. What about Paul Moorhead?

A. Oh, Paul—Paul played for us back in 1935, '34 and '36.

Mr. Cohen: I object to the answers on the ground that they are not responsive to the question. I believe the question was how long these orchestras have been in existence and the witness is answering that these various leaders had played, I assume we are talking about the orchestras mentioned in this contract which may or may not be the same ones that appeared five or six or seven years ago.

The Court: I wish you lawyers would find out that there is a rule that nobody has a right to object to the witness' answering the question, excepting the person that asks the question. Every lawyer in the United States seems [fol. 134] to think he has the right to make that objection, and that is not the rule. If it is competent and the other side asks the question, doesn't make any difference whether it is responsive or not, that is entirely an objection for the man that asked the question. Overruled. I won't charge you for that, either. (Defendant excepts).

Mr. Padway: I am becoming suspicious as to what will happen when you do get to charging us for it.

Q. Mr. Bartels, what can you tell the court as to the various types of establishments or organizations for which these five orchestras play engagements?

A. Oh, I know establishments all over the country from ballrooms to theatres, college dances and radio programs.

Q. In clubs or lodges?

A. Yes, clubs, the Elks Clubs.

Q. Now what can you tell the court as to whether you had any conversation with the leader of any of these orches-

tras prior to or at the time of the signing of the contrac for his particular orchestra's engagements?

A. No.

Q. Did you have any conversation with the side men of any of these orchestras prior to the time or at the time of [fol. 135] the signing of the contract for that particular orchestra?

Mr. Padway: May I interrupt? I am perfectly willing that the evidence previously given from this witness respecting his method and manner of operation with Williams be understood to be the same with respect to all of the other leaders, it will save a lot of time. If you are satisfied, you may not be, but as far as I am concerned, to shorten it up by stipulating that if you are willing to stipulate it.

Mr. Charlton: You are willing to stipulate including any further testimony that he may give?

Mr. Padway: I don't know what further testimony, but if you are going to go all over these orchestras, what he has said with respect to Griff Williams may be taken as far as I am concerned, as the evidence you would adduce with respect to the other plaintiffs, but if you have anything to vary it by, do so now, but I don't know about the Government, they are sticklers.

Mr. Charlton: If the court please, we tried to stipulate several months ago to that effect, and I sent a signed stipulation to Washington, and at that time it was not agreeable to the department.

Mr. Cohen: But I did tell you that during the trial we would so stipulate.

[fol. 136] Mr. Charlton: Before you were in the case.

Mr. Cohen: Well, I cannot talk for anyone else.

(Question read by the reporter.)

Mr. Cohen: I am only too glad, Your Honor, to stipulate that so far as the actual operations of these orchestras is concerned, they operate according to the—that the witness' testimony according to their operations would be the same as his testimony concerning the operations of Griff Williams' Orchestra. It is unfortunate that those questions

are not available so that we could agree all of the questions answered would be the same, but I suppose in a general way we may say the manner of operation, his testimony concerning the manner of operation would be the same for these orchestras as was his testimony regarding the operation of the Griff Williams' Orchestra.

Mr. Charlton: As proof of what he did with each of the engagements?

Mr. Cohen: Well, Your Honor, yes, I think that will be included, for example, as to whether he told them which room to take or whether he knew what their association was.

Mr. Charlton: All facts pertaining to the performance of each of the other five engagements as pertaining to the [fol. 137] acts of the leader and the acts of the side men and the contract and acts of the witness as manager of the Crystal Ballroom were identically the same with respect to all six orchestras, and the testimony relative to the Griff Williams' engagement shall be taken as indicating the true facts with respect to each of the other engagements.

Mr. Cohen: No, not as indicating the true facts, but as being the same testimony he would give with regard to the other engagements. Yes, I am agreeable to that.

Mr. Charlton: Is that agreeable with you, Mr. Padway?

Mr. Padway: Oh, yes, sure.

Q. And what can you tell us as to whether each of these five orchestras had a distinguishing style of—

A. Yes, they all had a distinguishing style.

Q. I will ask you about it very generally, I think. Tell the judge briefly what the style of each one of them was, as you recall?

A. Boyd Raeburn's style of music is fast. It is, you know, a band. He carries more faster style of music. Paul Moorhead was also, fifteen pieces, six trombones, one trumpet. Paul, by the way, carried his own lighting equip- [fol. 138] ment. Paul would come in some time in the afternoon and have his whole thing in there, and have his lighting put up in the building and his orchestra place. Tiny Hill, the largest Band leader, he was the largest in the

world, 385 pounds. Only eleven piece Hill Billy Band on the road that I—Buddy Fisher was quite an entertainer, and he entertained Al Jolson and several of those stars and could hit two or hit on one.

Q. You mean imitate?

A. Yes, he was an imitator. Bill Carlsen was another Band that carried considerable entertainment. Bill himself —Bill had the Zilch Brothers that were on the stage. They were comedians. That is about all I can tell you about it.

Q. How did you become familiar with the particular quality of these—each of these orchestras?

A. These booking agencies would exploit them, air time.

Q. Then some of them you had used before?

A. Yes, feature engagements.

Q. By air time you mean radio performances?

A. Yes.

Q. On whom did you rely in each instance to bring that special quality you have testified to in each case?

A. The leader of these orchestras.

[fol. 139] Q. That would be for your patrons that would be at your dance hall that particular night?

A. That is right.

Q. You mentioned Paul Moorhead. Do you recall how his orchestra traveled to Dubuque?

A. Yes.

Q. How was that? A. By sleeper bus.

Q. What, if anything, did it have on the outside of the bus?

A. Letters, I would say two feet high, across the top of the bus "Paul Moorhead and His Orchestra."

Q. Have you seen the inside of the bus?

A. Yes.

Q. You mention it being a sleeper. How many men would it sleep?

A. Ten to twelve, it would take care of his full Band.

Q. Who owned that bus if you know?

A. Paul Moorhead.

Mr. Padway: Well, I think that as far as he knows it may have been owned by the American Corporation of Music. I think the witness ought to be asked—well, I can cross-examine him on that as to how he know it. I will agree that he don't know.

The Court: It isn't very important anyhow, is it, wheth-
[fol. 140] er he leased it—

Q. I will hand you what the reporter has marked Exhibit T and ask you to turn to the reverse side of the exhibit and ask you to tell the court whether you prepared any of the entries appearing thereon?

A. I did not.

Mr. Padway: Whose contract are you referring to?

A. Buddy Fisher, November 23, 1941.

Mr. Padway: I thank you.

Q. I call your attention to the names of the side men appearing thereon and ask you if you know now any of those men that are listed on that? A. No.

Q. Now I will ask you to examine the column entitled "Wages", you find some amounts listed there?

A. Yes.

Q. Did you have anything to do with fixing the amount shown in that column entitled "Wages"?

A. No.

Mr. Padway: Objected to as calling for a conclusion.

The Court: Overruled. (Intervener excepts.)

Q. Can you tell the court as to whether the amounts shown on there are above or below the Union scale at Dubuque, Iowa?

[fol. 141] A. They are above.

Q. Incidentally, Mr. Bartels, were these, all this information on the reverse side of Exhibit T appearing there at the time you signed the contract?

A. No, it did not.

Q. Did the contract go out of your hands right after you signed it?

A. I sent it back to the booking agency.

Q. That is Exhibit T?

A. That is right.

Q. And some time later it did come back into your hands? A. Yes, sir.

Q. Plaintiffs' Exhibit X, a check of the Crystal Ballroom in the amount of $125 to the Music Corporation?

A. It is.

Q. And that is a deposit payment on Tiny Hill's Orchestra? A. On Tiny Hill's Orchestra.

Q. And what about Exhibit Y, is that a check made by the Crystal Ballroom, dated July 14, 1941, payable to the Music Corporation of America in the sum of $125, is that a deposit on Bill Carlsen's Orchestra?

A. Yes, sir.

Q. Exhibit Z, is that a check in the amount of $125, dated July 14, 1941, "Pay to the Order of Frederick Bruce, Mu-
[fol. 142] sic Corporation in payment of a deposit on Tiny Hill's Orchestra"?

A. Yes, sir.

Mr. Roberts: Plaintiffs offer in evidence Exhibits X, Y, and Z.

Mr. Cohen: I have no objections to the exhibits, but I would suggest for the record that we may save the encumbering of this record in this proceeding if we avoid the physical incorporation of these things into the record. The Government is certainly willing to stipulate that these amounts were paid.

The Court: That is a matter between you attorneys, that is one thing I don't have to worry about, what your agreements are.

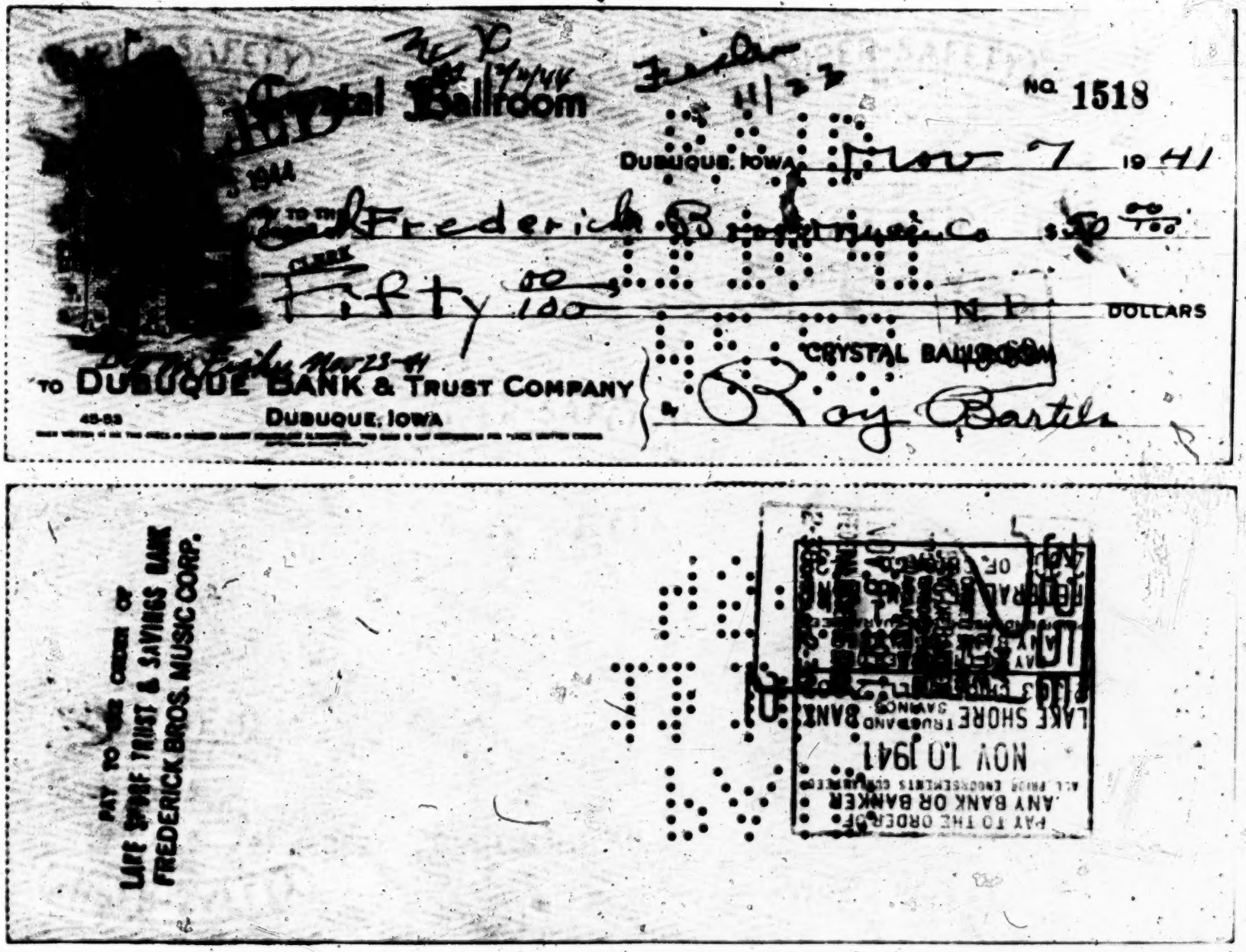
Mr. Roberts: And delivered to the payee?

The Court: These are pretty nice boys. Ask them now.

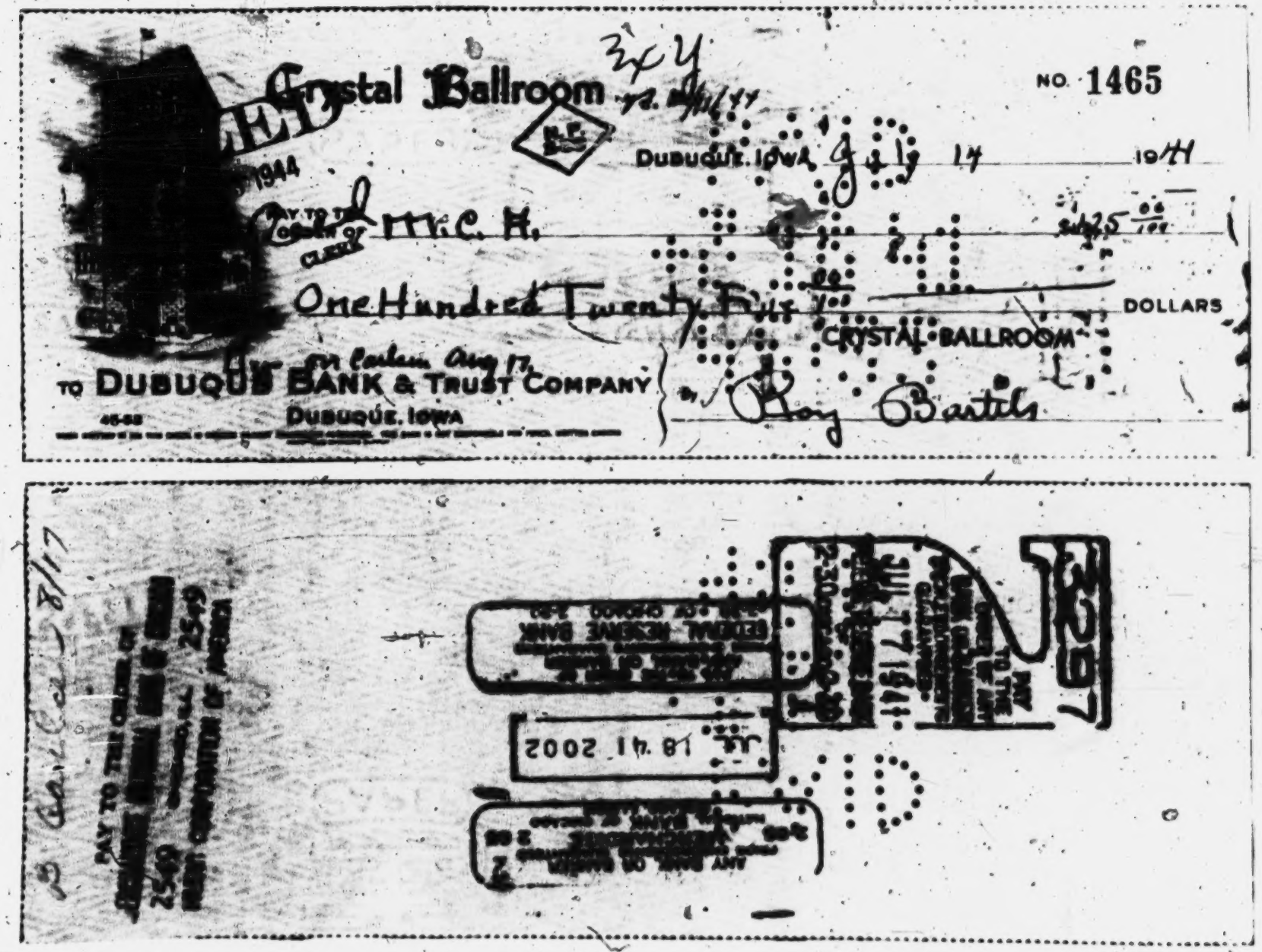
Mr. Roberts: They are all in now.

The Court: I guess there is no objection to them. They will be admitted.

Plaintiffs' Exhibit X.
Filed in U. S. District Court December 13, 1944.



Filed in U. S. District Court December 13, 1944.



Crystal Ballroom

NO. 1465

DUBUQUE, IOWA July 14 1944

PAY TO THE ORDER OF Mr. C. H. $125 00/100

One Hundred Twenty Five 00/100 DOLLARS

CRYSTAL BALLROOM

TO DUBUQUE BANK & TRUST COMPANY

DUBUQUE, IOWA

By Roy Bartels

PAY TO THE ORDER OF

FIRST CORPORATION OF AMERICA

2549

GENERAL RESERVE BANK

JUL 17 1944

JUL 18 41 2002

Plaintiffs' Exhibit Z.
Filed in U. S. District Court December 13, 1944.

Crystal Ballroom

NO. 1464

DUBUQUE, IOWA July 14 1941

Pay to the order of Frederick Bros Music Corp $125 00/100

One Hundred Twenty Five 00/100 DOLLARS

CRYSTAL BALLROOM

By Ray Bartel

TO DUBUQUE BANK & TRUST COMPANY
DUBUQUE, IOWA

45-53

PAY TO THE ORDER OF
LAKE SHORE TRUST & SAVINGS BANK
FREDERICK BROS. MUSIC CORP.

[fol. 149] Mr. Padway: I think it would be better to get these in evidence before you get the checks in because we are liable to overlook them.

Mr. Roberts: Plaintiff at this time offers in evidence Exhibits S, T, U, V, and W.

The Court: I guess there is no objection to them. They may be admitted. They are original copies of the contract.

Pls S
DS. 12/11/44

Contract Blank 138

FILED

DEC 1 [illegible] 1944

R. F. Reed
CLERK

FREDERICK BROS. MUSIC CORPORATION

520 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS

THIS CONTRACT for the personal services of musicians, made this [redacted] day of [redacted] 194[illegible]

between the undersigned employer (hereinafter called the employer) and [redacted] (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of [redacted] according to the following terms and conditions

Place of employment [redacted]

Date(s) of employment [redacted]

$125.00 deposit received

Hours of employment [redacted]

Price agreed upon $ [redacted] (Terms and amount)

To be paid [redacted] (Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Plaintiffs' Exhibit S
Filed in U. S. District Court December 13, 194

liability for the amount stated herein.

Name of Employer [redacted]

Street Address [redacted]

City or State [redacted]

Phone

FORM B

11 Printed in U. S. A.

Accepted by Employer Roy Bartels

Accepted [illegible]
(Orchestra Leader)

By [illegible]
(Representatives of Employees)

944

83

Plaintiffs' Exhibit S.
Filed in U. S. District Court December 13, 1944.

85

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Tiny Hill (Leader)	89	325-14-4584	$
Melvin Mountjoy	89	325-14-4582	
F. C. Patterson	20	521-05-7342	
R. W. Schreiber	798	325-14-4577	
Robert Kramer	798	332-10-7111	
Kermit Coffeen	798	325-14-4578	
Norman Maxwell	183	345-03-9515	
Ralph Richards	20	523-07-0030	
Robert Walter	26	325-14-5950	
Lloyd Mc Cann	25	410-07-9505	
Russ Phillips	200	497-10-5215	
Bob Freeman	vocalist	350-07-7566	

FILED **Contract** **Blank** 24 J 22 17/1/44 Nº 569

DEC 1 2 1944

FREDERICK BROS. MUSIC CORPORATION

CLERK

520 NORTH MICHIGAN AVENUE

CHICAGO, ILLINOIS

THIS CONTRACT for the personal services of musicians, made this 6 day of NOVEMBER, 1941 between the undersigned employer (hereinafter called the employer) and ELEVEN-ONE VOCALIST (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BUDDY FISHER, according to the following terms and conditions:

Name and Address of Place of Engagement CRYSTAL BALLROOM, DUBUQUE, IOWA

Date(s) of Employment NOVEMBER 23, 1941

Plaintiffs' Exhibit T.
Filed in U. S. District Court December 13, 1944.

87

Hours of Employment 9pm to 1am

$50.00 deposit received
Joe Kayne

PRICE AGREED UPON $ 100.00 GUARANTEE: PRIVILEGE 50% (Terms and Amount)

To be paid $50.00 DEPOSIT: BALANCE NOVEMBER 23, 1941 (Specify When Payments Are To Be Made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer ROY BARTELS

Street Address P. O. BOX 571

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartels

Accepted Buddy Fick (Orchestra Leader)

By Joe Kayne (Representatives of Employees)

FORM B

Printed in U.S.A.

Plaintiffs' Exhibit T.
Filed in U. S. District Court December 13, 1944.

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Buddy Fisher (Leader)	10	[illegible]	$ 11.55
George Veal	413	400-12-2035	5.50
Jack Moores	512	512-12-0266	5.50
George Drew	512	521-24-6143	5.50
Benny Hawkins	855	262-01-3018	5.50
Paul Hadsock	655	267-01-3374	5.50
Harry Webster	[illegible]	524-03-5839	5.50
Joe McAnerney	512	400-12-2157	5.50
Bill Ormiston	512	432-01-0064	5.50
[illegible] Walzer	512	[illegible]-12-2214	5.50
Nicholas Musolino	265	512-[illegible]-6238	5.50
Warren Durrett	512	507-12-6790	5.50
Gypsy Edwards	Vocalist	381-03-0035	6.00

FILED

DEC 1 : 1944

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RECEIVED
CHICAGO OFFICE
MUSIC CORPORATION
OF AMERICA

Ex U
OS 12/11/44

MUSIC CORPORATION OF AMERICA

CLERK

1941 JUL 12 AM 9:

16 Old Bond St., W. 1. LONDON Phone Regent 6508 | 745 Fifth Avenue NEW YORK Phone Wickersham 2-8900 | 430 N. Michigan Ave. CHICAGO Phone Delaware 1100 | M C A Building BEVERLY HILLS Phone Bradshaw 23211 | 111 Sutter Street SAN FRANCISCO Phone Exbrook 8922 | Union Commerce Bldg. CLEVELAND Phone Cherry 6010 | Tower Petroleum Bldg. DALLAS Phone 2-1448

THIS CONTRACT for the personal services of musicians, made this 12th day of JULY, 194 1

between the undersigned employer (hereinafter called the employer) and twelve (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BILL CARLSEN, according to the following terms and conditions:

Place of employment CRYSTAL BALLROOM DUBUQUE, IOWA

Date(s) of employment AUGUST 17, 1941

Hours of employment

Price agreed upon $ $250 GUARANTEE WITH PRIVILEGE OF 60% OF THE GROSS RECEIPTS
(Terms and amount)

To be paid $125 DEPOSIT; BALANCE BEFORE 11 PM NIGHT OF ENGAGEMENT
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer CRYSTAL BALLROM by Roy Bartels

Street Address P.O. BOX 371

City or State DUBUQUE, IOWA

Phone 6363

Accepted by Employer Roy Bartels

Accepted (Orchestra Leader)

By MUSIC CORPORATION OF AMERICA
(Representatives of Employers)

FORM I: (1) Printed in U. S. A.

Plaintiffs' Exhibit U.
Filed in U. S. District Court December 13, 1944.

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FILED

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Contract Blank

12/11/44

AMERICAN FEDERATION OF MUSICIANS

Local No. [redacted]

THIS CONTRACT for the personal services of musicians, made this [redacted] day of [redacted], 194[redacted]

between the undersigned employer (hereinafter called the employer) and 24 [redacted] musicians (hereinafter called
(including Leader)
employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the

leadership of [redacted], according to the following terms and conditions:

Plaintiffs' Exhibit V.
Filed in U. S. District Court December 13, 1944.

93

Place of employment CRYSTAL BALLROOM - DUBUQUE, IOWA

Date(s) of employment OCTOBER 5th, 1941

Hours of employment (Fill in)

Price agreed upon $ $175.00 GUARANTEE AGAINST 60% PRIVILEGE OF GROSS RECEIPTS.
(Terms and amount)

To be paid BY 11:00 P.M. EVENING OF ENGAGEMENT.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer MR. ROY BARTELS

Accepted by Employer Ray Bartels

Street Address CRYSTAL BALLROOM

APPROVED:
WILLIAM MORRIS AGENCY, [redacted]
(Orchestra Leader)

City or State DUBUQUE, IOWA

BY W. E. Snyder

By Floyd Rawson
(Representatives of Employees)

Phone

Countersigned and affirmed by MORRIS S. SILVER,
RESIDENT [illegible] MANAGER

FORM B

(Signatured by) [illegible]

BOOKING SLIP No. 590

44 Printed in U. S. A.

FILED

DEC 1 ? 1944

N. F. Reed

CLERK

VSA

Ex W

VS. 12/11/44

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 25 day of June, 194 1 between the undersigned employer (hereinafter called the employer) and Ten (10) Men (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Crystal Ballroom Dubuque, Iowa	Sunday, January 18, 1942	From 9:00 P.M. to 1:00 A.M.

1942 Contract

PRICE AGREED UPON IS: 100.00 guaranteed; plus the privilege that the attraction may take 60% of gross receipts
(Terms and amount)

To be paid on or before 10:00 P.M. on date of engagement 40 cents 40 Bills
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the engagement hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

A written notice by Registered Mail, Return Receipt Requested, or by Telegram, addressed to the other party hereto GIVING EIGHT WEEKS NOTICE of cancellation of this contract, shall be permissable on the part of either party.

The employer ESPECIALLY AGREES that the price hereof, DOES NOT INCLUDE ADVERTISING OF ANY KIND; and that unless said employer specifies amount wanted, the assortment and quantity shipped, will be accepted.

Name of Employer: Roy Bertels — Accepted by Employer: Roy Bertels

Street Address: Crystal Ballroom — Accepted: (Orchestra Leader)

City or State: Dubuque, Iowa — By: N. Immona (Representative of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1260, Omaha, Nebraska.

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No 5327 A

Plaintiffs' Exhibit W.
Filed in U. S. District Court December 13, 1944.

95

[fol. 157] Q. I hand you now what has previously been marked plaintiffs' Exhibit S, and ask you to examine the reverse side, and I will ask you if you have anything to do with preparing the typewritten entries appearing on the reverse side? A. No, I didn't.

Q. What can you tell the court as to whether or not those entries were on the contract at the time you signed it? A. No, they were not.

Q. Did the contract go out of your hands?

A. Yes, it did.

Q. And later come back to you? A. Yes.

Q. That is the contract for the engagement of Tiny Hill and his orchestra? A. Yes, that is right.

Q. What can you tell the court as to whether the entries on the reverse side of that exhibit, and the entries on the reverse side of the contract for the engagement of Buddy Fisher's Orchestra, whether they are one of the orchestras on which information appears on the reverse side of the contract involved herein.

Mr. Cohen: I object on the ground the contracts speak for themselves and are the best evidence.

The Court: Overruled. (Defendant excepts.)

[fol. 158] A. These are the only two.

Q. That is Buddy Fisher and Tiny Hill?

A. Buddy Fisher and Tiny Hill.

The Court: There is no question whether you complied with the requirement.

Q. I hand you now what the reporter has marked Exhibit A-1 and A-2, and ask you if Exhibit A-1 is a yellow printed sheet entitled "Social Security Tax Report" with some typewritten entries appearing thereon? A. It is.

Q. Whose name appears in the lower right-hand corner?

A. Well, Tiny Hill.

Q. I will ask you if Exhibit A-2 attached to Exhibit A-1 is a postoffice money order, dated November 15, 1941?

A. That's right, it is.

Q. Payable to the order of Roy Bartels?

A. Payable to the order of Roy Bartels.

Q. And who was listed as the remitter?

A. Tiny Hill.

Q. And what can you tell the court from looking at the date of the postoffice money order as to when you received those documents?

A. I received it some time after November 15, 1941.

Q. And just how did you receive them?

[fol. 159] A. By mail.

Q. Through the mail? A. Yes, sir.

Q. Were those two documents clipped together at the time you received them? A. Yes, sir.

Q. State whether or not any typewritten entries appear on Exhibit A-1, were prepared by you?

A. No, sir.

Q. What can you tell the court as to whether the amount shown in the column entitled "Wages," on Exhibit A-1, were above or below the scale of the Dubuque Local American Federation of Musicians?

A. They were above.

Q. What, if anything, did you have to do with fixing the amounts shown on Exhibit A-1 as wages?

A. Nothing.

Q. Did you ever receive from any of the side men of Tiny Hill's Orchestra there in that receipt showing the amount received by them for their engagement at the Crystal Ballroom? A. No.

Q. Now what can you tell the court as to whether the plaintiffs ever carried the names of the leaders or the side [fol. 160] men of any of these five orchestras we have been inquiring about on their pay roll? A. No.

Q. On the plaintiffs' pay roll? A. No.

Mr. Roberts: Plaintiff at this time offers in evidence Exhibits A-1 and A-2.

Mr. Cohen: May we have a chance to look them over for a moment, if the court please.

Mr. Padway: There is no objection to plaintiff's Exhibit A-1, entitled "Security Tax Report, Tiny Hill's Orchestra" on the part of the interveners.

Mr. Cohen: No objection.

Mr. Padway: And to it is attached a money order of ninety-four cents. Are you offering the two as one exhibit?

Mr. Roberts: Each as a separate exhibit.

Mr. Padway: Then there is no objection on the part of the intervener to either exhibits.

Mr. Cohen: I have no objection.

The Court: Well, I guess they are admitted [them] if there is no objection.

[fol. 161] Plaintiffs' Exhibit A-1.

Filed in U. S. District Court December 13, 1944.

Social Security Tax Report

"Tiny" Hill's Orchestra Sept. 28, 1941

Employer's Name Roy Bartels Employed at Crystal Balrm.

Address ..... Address .....

City Dubuque, Iowa State..... City Dubuque State Iowa

Harry L. Tiny Hill	325-14-4584	15.00
J. Melvin Mountjoy	325-14-4582	7.00
F. C. Patterson	521-05-7342	7.00
Lloyd McCahan	410-07-9505	7.00
Russel Phillips	497-10-5215	7.00
Wally Fobart	397-01-3132	7.00
Kermit Coffeen	325-14-4578	7.00
R. W. Schreier	325-144-577	10.50
N. V. Maxwell	345-03-9515	7.00
Robert Walter	325-14-5950	7.00
Eugene Bolen	368-16-3469	7.00
Robert Freeman — Vocalist	350-07-7566	5.00
		93.50
.....	.....	.....
.....	.....	.....

Amount of Contract $250.60 Amount Paid Band.....$278.97
Sideman's Scale $5.00 Leader Scale $10.00 Union Tax $ 6.00

Commission Paid on this Engagement $55.79

Actual Transportation @ $..... Per Mile..... $.....

Salaries as listed above $93.50

155.29

123.68

The above figure of $123.68 is the net amount left on this particular engagement. This amount will be used for additional transportation, advertising, exploitation, additional booking expense, personal managers' salaries, sundries (cabs, lunches, etc.) of all kinds and any other legitimate expenses that may arise from time to time in the operation of this enterprise with the expenses listed at the end of the fiscal year, August 1, 1942, any excess amount will be charged at that time to Harry L. Hill's personal income and income tax made out accordingly.

Soc. Sec. 1% — $ .94

Signed H. TINY HILL

[fol. 162] Plaintiffs' Exhibit A-2.

Filed in U. S. District Court December 13, 1944.

$ 48100 Salt Lake City, Utah. 95225

*1 Office Number Serial Number

United States Postal Money Order
Identification required

Dollars # 94 Cents

Nov. 15, 1941

Postmaster at
Dubuque, Iowa

Pay amount stated above to order of payee named in attached coupon. Not good for more than largest amount indicated on left hand margin.

Any alteration or erasure renders this order void.

paying office

(Postal Money Order)

C. A. Smoot, Postmaster

Received payment:

Stamp here .....

.....

Paying postmaster detach coupon on this line

Salt Lake City, Utah.

48100
Office Number

95225
Serial Number

Coupon for Paying Office
Holder must not detach

..... Dollars 94 Cents
Write words for dollars Figures for cents

Pay to:
Roy Bartels

Remitter:
.....

H Tiny Hill
Lake City, Ill

(SEAL)
Salt Lake City, Utah
Nov
15
1941
M. O. R.

C. O. D. .....
Parcel Number

A-2
VG 12/1/44

[fol. 163] (Reverse Side)

Pay to.....
.....Payee

To transfer ownership the person in whose favor this order is drawn must sign on above line.

More than one endorsement is prohibited by law.

Upon payment of a fee of the same amount as that charged for the issue of the order the postmaster at any money order Post Office in the Continental United States, except Alaska, will pay this money order, if presented within thirty days from date of issue, although drawn upon another post Office provided the Order was issued at and drawn upon a Post Office in the Continental United States, exclusive of Alaska.

If not presented for payment before the expiration of one year from the last day of the month in which issued, an or-

der becomes invalid by law, and the owner should present it to the Postmaster, at a money order office, who will promptly forward it to the Department with an application for a warrant to be issued in lieu thereof free of charge.

Send the Order and coupon to the person to whom the money is to be paid.

Do not mutilate the order or coupon or detach them from each other, or alter them in any way.

Bank stamps are not regarded as endorsements.

Bank Stamps

.....

Paying Office

Stamp here

[fol. 164] Q. I believe you testified that early in your examination that some of these five, these last five orchestras we have been inquiring about had played for you previously? A. Yes, sir.

Q. Was that prior to June 1, 1941, these previous engagements? A. Yes, sir.

Q. What can you tell us as to whether there was any difference in what the side men and the leader of each of these orchestras did during the performance of their earlier engagements, and what the leader and side men of each of these orchestras did on the occasion of the engagements involved in this suit?

A. No, their performance was the same.

Q. There was no difference?

A. No difference.

Q. And you had nothing to do with the preparation of any contracts involved in this action, including Griff Williams' contract?

A. No, sir.

Q. Now you have testified as to various matters concerning which you gave no instructions or directions to the leaders and his side men. Do you have a belief as to whether [fol. 165] or not you could give instructions or directions to the leader?

Mr. Padway: That is objected to as the contract speaks for itself, and as to what he could have done, and that is objected to as incompetent, irrelevant and immaterial, varying the terms of a written instrument.

The Court: Overruled. As I understand it, this is a contract—an attack on the contract by a third party. Overruled. Answer, please. (Intervenors except.)

A. I always believed I never had anything to do with them, and never had any instruction.

Mr. Padway: I object to the answer and move to strike it on the basis of the previous objection.

The Court: Overruled. By the way, you want exceptions, it is not required, but I suppose by agreement, the reporter can put in the exceptions on all adverse rulings on both sides. (Intervener excepts.)

Mr. Level: It is so agreed.

Mr. Roberts: That is agreeable.

Q. That was true, your belief was true with respect to each of the Orchestras you have inquired about and the leaders?

A. That is right.

Mr. Padway: Same objection.

The Court: Same record. (Interveners except.)

[fol. 166] Mr. Roberts: I believe that is all of the direct examination, Your Honor.

The Court: All right, cross-examine.

Cross-Examination.

By Mr. Cohen:

Q. Mr. Bartels, I believe you testified on direct examination that these various contracts were submitted to you by several booking agencies, is that correct?

A. Yes, sir.

Q. Now, let's take the Griff Williams' contract. That was submitted by MCA, Mr. Breyley; is that correct?

A. Of September 1, 1941, yes, sir.

Q. Now did you read the contract at that time?

A. I did.

Q. You knew what it contained?
A. I did.
Q. Did you know that the contract purported to give you the right of control over the musicians, including the leader?

Mr. Roberts: Objected to as calling for a legal opinion and calling for the conclusion of the witness.

The Court: Overruled. Answer, please. (Plaintiffs except.)

(Question read by the reporter.)

A. Well, I know that the—I deny I had the right to con-
[fol. 167] trol.

Mr. Cohen: I move to strike out the answer as not responsive.

The Court: Sustained. (Plaintiffs except.)

(Question read by the reporter.)

A. I knew that was in the contract, yes.
Q. Now did you also know that the contract refers to the Crystal Ballroom as the employer of these side men?
A. Yes.
Q. And did you know that you authorized Griff Williams or the representative leaders of the other Orchestras to distribute to the side men on your behalf the moneys which you paid for the engagement? A. Yes.
Q. Now you read the other terms of the contract, isn't that correct? A. Yes.
Q. So that you knew it was in the contract?
A. Yes.
Q. Now at the time Tiny Hill's Orchestra performed at your establishment, you had a certain number of side men, isn't that correct?
A. I don't understand.
Q. How many side men did Tiny Hill have at your es-
[fol. 168] tablishment on the date of his engagement in 1941?
A. Well, you would have to give me the contract.
Q. I show you plaintiffs' Exhibit S, and ask you to refresh your recollection.
A. Eleven.

Q. Now did you have a copy of this contract at the time of the engagement?

A. Yes, sir.

Q. Was this the contract which had been signed by you, submitted to Frederick Bruce's Music Corporation and returned to you with the names of the musicians filled in?

A. That is the contract that I had.

Q. Then isn't it true that at the time they played at your establishment on September 28, 1941, that you have in your possession the names, the Social Security numbers of the various musicians, including the leader?

A. Yes.

Q. And isn't that true also of the engagement of November 23, 1941, of Buddy Fisher and his orchestra?

A. I believe so.

Q. So that if on those two occasions you did not know the names of the side men, it was due to your own failure to look at the contract that you signed?

A. The contract as I signed it at that time didn't have [fol. 169] those names on.

Q. But at the time the engagement, the names were in your possession, isn't that true?

A. Yes, that's right.

Q. Now did you at the time of the engagement of Griff Williams, Paul Moorhead, Boyd Raeburn, ever ask those leaders for the names and social security numbers of the side men in their orchestras?

A. I did not.

Q. Did you ever request them as to how much was being paid by them as your agent to the side men?

Mr. Roberts: Objected to as assuming facts not in evidence, and an attempt to invade the province of the court.

The Court: This is cross-examination. Overruled. Answer. (Plaintiffs except.)

(Question read by the reporter.)

A. I did not.

Q. Did you ever request them to give you the social security numbers of the side men?

A. No.

Q. So it is true, isn't it, Mr. Bartels, that at no time did any of these leaders withhold that information from you?

[fol. 170] A. Well, that was not on the contract.

Q. You never asked for that information from these leaders, isn't that correct?

A. No, I deny that I am the employer of these men.

Q. We know you deny that, but answer the question.

A. What is the question?

(Question read by the reporter.)

A. That is right.

Q. Now, Mr. Bartels, I believe you stated on direct examination that you were not a musician yourself, is that correct?

A. That is right.

Q. Now were any of these members of the partnership which does business as the Crystal Ballroom, musicians?

A. No.

Q. Now did you ever contract any musicians who performed at your ballroom as to the tempo in which they should play, or the uniforms they should wear or the intermission that they should take, or the path along which they should walk during the intermissions?

A. No.

Q. In fact, am I correct, that you were never at the ballroom until after the musicians started to playing?

A. I would be at the ballroom in the afternoon to look [fol. 171] the place over, yes.

Q. At the time that they commenced their performance, you were not there, is that correct?

A. I would not be in the ballroom at that time.

Q. Now was there anyone in charge of the Crystal Ballroom who may have given instructions to these musicians? A. No, there would not be.

Q. Well, did you depend upon the musicians themselves to conduct themselves according to your sense of deportment or the proper deportment?

A. The leaders usually took charge of that.

Q. Is it a correct statement that you entrusted to the leaders the control of those matters?

A. He is the man that engaged these musicians, yes. He was responsible for that.

Mr. Cohen: I move to strike that as not responsive to the question.

The Court: Sustained, yes. (Plaintiffs except).

Q. You can answer that yes or not.

(Question read by the reporter.)

A. Yes.

Q. Now are you able to tell the court whether—Strike that, please. Now I believe it is true that on November 23, 1941, Buddy Fisher and his Orchestra performed at your [fol. 172] ballroom, isn't that correct?

A. That is correct.

Q. Now can you state for how long a period the aggregation of musicians who played at that time had been organized as Buddy Fisher and [redacted] Orchestra?

A. Oh, I have heard of them for years.

Q. Have you ever heard of these side men for years?

A. No.

Q. You don't know whether he had this orchestra or another orchestra previous to this engagement?

A. That is right.

Q. In other words, this orchestra may have come into existence for this particular engagement, isn't that correct? A. Their performance—

Q. So far as you know?

A. Their performance didn't indicate that they were wild recruits.

Q. Now is that also true of the various other orchestras which are involved in this case? A. That is right.

Q. You cannot tell whether they were in existence for a day or for a year or more except for the quality of their performance together?

A. Some of them have played for me before, I know [fol. 173] they were in existence.

Q. You know they were in existence?

A. Griff Williams played for me back in 1940, '39.

Q. Now did you know the side men in his orchestra who performed at that time? A. No.

Q. Do you know the side men in his orchestra who performed on September 1, 1941? A. No.

Q. Well, then you cannot tell, Mr. Bartels, whether the same orchestra played previously or not?

A. I bought Griff Williams and his orchestra.

Q. But you don't know whether the particular aggregation which played on September 1, 1941, was the same orchestra which played before, do you?

A. I would have no way of telling that.

Q. I am not sure that I understand what plaintiffs' Exhibit A-1 is, it purports to be a list of Tiny Hill's Orchestra on Social Security Tax report. When was that list furnished to you?

A. That was furnished to me some time after November 15, 1941.

Q. And is plaintiffs' Exhibit A-2 a money order of Tiny Hill to you for ninety-four cents?

[fol. 174] A. That is right.

Q. Now what was that for?

A. That was the list, that was in payment of this list Tiny sent me which he said was the side men of his orchestra.

Q. Didn't you testify in direct examination that none of the contributions which you made to the Government had been obtained by you from these musicians?

A. That money order is not cashed, I paid it out of my own fund, that contribution.

Q. You never cashed out this money order?

A. No, Tiny Hill had it. I would not have it if I had cashed it.

Q. And as far as any of the other musicians are concerned, they never paid you any contributions? A. No.

Q. None of them, including the leaders? A. No.

Q. Now, Mr. Bartels, am I correct—I want to be sure about this—that at no time did you give instructions during the playing of these particular engagements to the leader or to the side men? A. That is correct.

Q. Is that correct?

[fol. 175] A. That is right.

Q. It is also true that at no time did the leader or any of the side men refuse to obey any of your instructions?

A. I gave them no instruction.

Mr. Cohen: I have no further questions.

Cross-Examination.

By Mr. Padway:

Q. Mr. Bartels, at the outset of your direct examination by Mr. Roberts, you said you protested this contract when it was submitted to you? A. That is right.

Q. Did you use the word object to it?

A. That is right.

Q. Did you object to the fact that your contract, the sum to be paid was to be a $350 guaranty? A. No, sir.

Q. Did you object to that, that there was 60 per cent of it, of the gross receipts? A. No, sir.

Q. Didn't object to that as a bonus in event it went higher than $350? A. That is right, sir.

Q. Didn't object to that? A. No, sir.

[fol. 176] Q. Did you object that the engagement was to be fixed for September 1st or was that in agreement between you?

A. That was the agreement between us.

Q. September 1, 1941. Did you object that the number of men to be employed was thirteen, including the leader?

A. No, I didn't object to that.

Q. Did you object that the leader would take the sum of money and distribute it among the men?

A. I didn't know what he would do with his money. I paid the money to Mr. Williams.

Q. You knew he was to distribute that if you read this contract? A. That is right.

Q. And you knew that you were purchasing and engaging the personal services of the employes as musicians severally. You know what the word severally means, do you? A. Yes, sir.

Q. And that each one was being engaged by you, is that what you objected to? A. Yes, sir.

Q. You objected to that? A. Yes, sir.

Q. Now you read on further, I presume that they agreed to render collectively to the employer services as [fol. 177] musicians in the orchestra under the leadership of Griff Williams. Did you object to that?

A. I objected to it. Read the whole clause, it is not fair to take out—

Q. I will read the whole paragraph. It says here: "That the employer employs the personal services of the employes as musicians severally, and the employes severally through their representatives agree to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams to only the terms and conditions."

A. I objected to the word "employer" in that contract.

Q. And you objected to the word "severally," that you were employing these men severally, is that right?

A. Well, you mean individually when you talk severally?

Q. Yes, that's right.

A. I—yes, I objected to that.

Q. You objected to the fact that it is stipulated there that there were to be thirteen musicians including the leader you were employing?

A. No, I didn't object to the thirteen musicians, that was his orchestra.

Q. What you objected to was to being designated employer of the division?

[fol. 178] A. That is right.

Q. You didn't object, of course, to the place where they were to be employed because that was your ballroom?

A. That is right.

Q. Did you have a platform in the ballroom?

A. There is a Band stand there, yes.

Q. Or Band stand? A. Yes.

Q. Was that of a permanent nature? A. Yes, sir.

Q. So that when Mr. Griff Williams and the orchestra came to play at the Crystal Ballroom, they would take their station on this permanent bandstand or platform?

A. That is right.

Q. Now then you had no objection you say to Mr. Williams placing the divisions where he saw fit?

A. No, that was his business.

Q. Now did you object to the part of the contract which says "The employer shall at all times have complete control of the services of each of the employes which render to the satisfaction—"

A. I did want it—Pardon me. I deny always that I am the employer of those musicians. Mr. Williams brought his orchestra there. He hired those men.

[fol. 179] Q. But you saw that in the contract?

A. Yes.

Q. And you objected to that? A. Yes, sir.

Q. It was in response to these objections that the agent Mr. Breyley told you that you will either have to engage them under this contract, or you are not going to have any music? A. That is right.

Q. That is what he told you? A. Yes.

Q. That was all said and done before you signed the contract? A. Yes.

Q. And it was after you had this colloquy or conversation and made these objections that you signed the agreement? A. Yes, sir.

Q. Arrangement for the musicians? A. Yes.

Q. Now, you signed this agreement back on the 26th day of July, 1941. Correct? A. Yes.

Q. And the services were to be as of September 1, 1941? A. That is right.

Q. An elapse of some couple of months I dare say, bet-
[fol. 180] ter than a couple of months?

A. I would say a couple of weeks.

Q. About four or five weeks. You are right. You had four or five weeks of elapsed time intervening?

A. That is right.

Q. During that time you did not attempt to repudiate the contract, did you? A. No.

Q. And in the instance of, let us say, Buddy Fisher, there was an elapsed time from the time of the contract until you got it, after you signed it, it was signed and sent back, wasn't it?

A. Sent back from the booking agency.

Q. Then the booking agency returned it to you with some items and typewritten matter on the reverse side, is that right? A. That is right.

Q. And did you object to that typewritten matter that was displayed?

A. It was immaterial to me after I signed it what they put on it. I had nothing to do with it.

Q. As far as you were concerned, you were little concerned or took no concern of anything appearing on the reverse side?

[fol. 181] A. That is right.

Q. Now then in this contract you observed, did you not, that it was not necessary to fill out the reverse side of that particular contract, but a separate statement could be rendered to you of the names of the musicians and others, isn't that right?

A. That I don't know. I would have to read the contract back.

Q. You read it at that time, didn't you?

A. That is possible.

Q. And did you observe this in your contract? I am reading from a quotation of it, if you want to read it directly from the original one—"On behalf of the employer the leader will distribute to the men—" referring to the employes—"including the list as engaged on the opposite side of this contract, and in place thereof a separate memorandum supplied to the employer during or before the commencement of the employment herein contracted and turned over to the employer receipt therefrom from the employes including the list"—does that refresh your recollection; do you recall that appearing in the contract?

A. Yes, sir.

Q. And in the case of Buddy Fisher you actually ob-
[fol. 182] tained a return of the contract with the notation of this information on the reverse side of it before Buddy Fisher came to play?

A. There is a list of names, members on the back, but that is all that I saw.

Q. Well, but it came, I say, the contract.

A. I say names and numbers, that is all.

Q. I think that one had the salaries too, paid them, Tiny Hill had the names and numbers without the salary?

A. That is right.

Q. Buddy Fisher had the salary, isn't that right?

A. Yes, sir.

Q. You will have to answer yes or no. The reporter cannot get your nod.

A. Yes.

Q. Now then the purpose of that information was to enable you to pay social security, wasn't it?

Mr. Roberts: That is objected to as calling for an opinion and conclusion of the witness, not proper cross-examination.

The Court: Sustained. (Intervener excepts.)

Q. Well, in order to pay social security on your employes, you have to have their names and amounts they earn, don't you?

[fol. 183] Mr. Roberts: Objected to as not proper cross-examination.

The Court: Overruled. (Plaintiffs except.)

Q. You may answer, Mr. Bartels?

A. In order to pay on—I don't claim them to be my employes, I pay it on my regular employes.

Q. Let's take the regular employes. You pay social security for them, and in order to pay that you have to know the amounts, don't you?

A. Well, that's right.

Q. Have you ever tried to obtain the names and amounts of the musician who worked for you to this date?

A. To this day?

Q. Yes.

A. I have since, yes.

Q. Who did you ask?

Mr. Roberts: Objected to as incompetent, irrelevant and immaterial, not pertaining to any issue in this case, pertaining to facts that happened after anything in this case.

The Court: Overruled. (Plaintiffs except.)

Q. Who did you ask to furnish you with the names and amounts that were earned?

A. Only of the Band, the orchestra leader.

[fol. 184] Q. How did you do that?

A. By word of mouth.

Q. Did you call him on the long distance phone or did you talk to him?

A. No; it was there on the contract. I think they are on all contracts now, that the Union will give now.

Q. It is a fact, is it not, that in the first part of the Form B contract, the first few weeks it happened some times they had not put it on the back and didn't have it on the back; isn't that right?

A. Yes, sir.

Q. They are pretty careful now about putting it on the back? A. Yes.

Q. Recent days you have signed it all filled out, haven't you? A. No.

Q. Well, do you know any one in the last year that has not filled out the complete information on the reverse side?

A. Well, Tiny Hill.

Q. Well, now, isn't the reason why it is not filled out in this instance is because 60 per cent of it, they must wait un-

til the engagement is over to know whether they take the $350 or take the 60 per cent?

[fol. 185] Mr. Roberts: Objected to as calling for an opinion and conclusion of the witness.

Mr. Padway: I have no objection. If counsel objects to it, I will just withdraw the question. I wanted it shown to give the information in the record to show why it could not be even determined in advance, because an option of payment, it was either for his payment of the $350 or—they could not possibly put the amount in there, if Your Honor please, until after they knew what had been the take.

The Court: You said if he is going to object you would withdraw the question. I think it is absolutely all right if you want to withdraw it.

Mr. Padway: I am not going to show that. I am going to have a question you can answer. Let me reframe the question.

Q. This 60 per cent fee, as the court may know, was an option to the leader to take 60 per cent of the gross for that evening in preference to the amount that was stipulated, am I right?

A. All orchestras didn't get that.

Q. I know. It is only when it appears in the contract. Correct? A. Yes.

[fol. 186] Q. Now then in order to determine whether he takes the $350 or the 60 per cent, and what he would pay out to the musicians, you must wait until the take is complete?

A. I wouldn't know that.

Q. All right. That is a fair answer.

The Court: I think we are kind of imposing on the reporter. I think we better take a ten minutes recess.

Mr. Padway: Judge, I was waiting for you to say that ten minutes ago.

The Court: I tried to, but I couldn't get my mouth open.

Recess: 3:40-3:55 p. m.

The Court: As I understand it, there was not anything on the reverse side of any of these contracts?

Mr. Padway: On some there were and some there weren't. I tell you, Judge, I am asking him the question, I don't think the ruling is material one way or another.

The Court: You can approach the question from a different angle.

Mr. Padway: I will show you why—

The Court: I was not sure I got the purport of the question that was to the effect whether or not he was ob-
[fol. 187] jecting to paying that tax, why that might have been all right.

Mr. Padway: Let me state to the court, the reason I was bringing this out was in the early part of the use of these contracts they just failed to put it on the reverse side, that is, the ministerial act. It is our contention, he would not make any—he could not find out previous to the time. If he knows what it is already, he can write to a person and the Government will take his money.

The Court: I don't care about the argument.

Mr. Padway: I will put the question again in this form.

Q. What did you believe the information to be, set forth on the reverse side of the contract, or any separate memorandum that is to be furnished to you, that is pretty bad English, but—

Mr. Charlton: That is objected to as incompetent, irrelevant and immaterial, not proper cross-examination, and directed to the present time which is immaterial.

Mr. Padway: No, not in these contracts. I will fix the time.

Mr. Charlton: His present belief is what your question calls for.

[fol. 188] Q. What did you think at the time you signed the Griff Williams' contract? Read it. It requires information to be given to you on the reverse side of the memorandum. What is the purpose of that information?

A. Griff Williams didn't give me any information.

Q. But you knew that the contract called for it, didn't you? A. Yes.

Q. In fact you did see it on the Buddy Fisher contract?
A. Yes.

Q. And you saw a part of the information on the Tiny Hill contract? A. Yes.

Q. When you saw that was it not your belief that the purpose of the information was to give you what amount had been paid out by way of services, payment for services of these men so that you in turn could pay your tax to the Government?

A. That I would not know what it was for on the back. I didn't put it on there.

Mr. Padway: Well, if the court please, that repeats my question and it has been answered. That is all.

[fol. 189] Redirect Examination.

By Mr. Roberts:

Q. Mr. Bartels, you have testified on cross-examination that you protested the form of this contract, that is, the Williams' contract for the engagement of September 1, 1941, that was to Mr. Breyley?

A. I did.

Q. Just what was it you said to Mr. Breyley?

A. I objected to the signing of this where they called me the employer, and Breyley says, "Go ahead and sign it", he said, "it is just a change that has been requested by Petrillo, and", he says, "it will give you no more power now than it was before". He said, "It won't change your status a bit."

Mr. Padway: Objected to as incompetent, irrelevant and immaterial, tending to vary the terms of a written instrument, and is incompetent.

Mr. Charlton: Merely stating the entire conversation at the time of the objections which were shown in cross-examination.

Mr. Cohen: If the court please, I would like to object on the same ground, it seems to me it is incompetent to have oral testimony as to the negotiations which proceeded or were concerned with the signing of the contract. This is [fol. 190] the contract and is not subject to any testimony of parol evidence.

The Court: I will take it subject to the objection. It is my understanding it is particularly when a third party attacks a contract, between the parties you may be right, but this is a different situation and we will have to hear the evidence.

Q. Now Griff Williams was at the Crystal Ballroom on the occasion of each of these engagements?

A. That's right.

Q. And he had the same style of music on each occasion?

A. He did.

Q. And you were not interested in the identity of the side men so long as they produced the music that they wanted?

A. I bought Griff Williams and his orchestra. The side men made no difference to me, they were his men.

Mr. Roberts: That is all.

Witness excused.

The Court: I guess you are excused. Call your next.

Mr. Padway: I would like to go into that a little bit.

The Court: All right. You mean into this last answer? [fol. 191] Yes, I think that is proper. It seems to me you have a right to show what the oral contract was between the parties as affecting the rights where a third party is attacking it.

Recross Examination.

By Mr. Padway:

Q. On cross-examination before the recess you said Mr. Breyley told you that you couldn't have the orchestra unless you agreed to this contract?

A. That is right.

Q. And you have told us that you have made certain objections to the contract? A. That is right.

Q. The only objections was that you didn't want to be designated employer, is that right?

A. Yes, I objected to being called the employer and signing of that contract.

Q. You said another objection was that you did not want to assume control, did not like the clause in there that said you were to assume control?

A. That is right.

Q. You say you discussed that with Mr. Breyley?
A. That's right.
Q. Mr. Breyley told you Mr. Petrillo, who, by the way, [fol. 192] you know to be president of the American Federation of Musicians insisted on this form of contract, didn't he? A. That is right.
Q. He told you those were the rules of the Union, didn't he? A. Well, he may not have told only —
Q. I think you said that in response to a question of Mr. Roberts after recess.

Mr. Charlton: That is objected to as assuming facts contrary to the record, contrary to the testimony of the plaintiffs.

Mr. Padway: If it isn't the fact he can say so.

Q. Do I understand you to say that was one of the things the Union demanded?
A. I think I said there was [redacted]ause —

The Court: Now let this witness answer. You both jump in before he has a chance. Go ahead and answer.

A. I think I — I don't know just exactly the words I said. He said Mr. Petrillo requested that in the contract.
Q. And you knew at that time that Mr. Petrillo was President of the American Federation of Musicians?
A. Yes, sir.
Q. And you knew too that the members including the side men and leader who were to play under this contract were members of the American Federation of Musicians, didn't you?
[fol. 193] A. Yes, sir.
Q. You knew that the rules and regulations of the American Federation of Musicians were binding upon you, didn't you?
A. I also knew they were binding on the orchestra leader because anything — the Musicians Union, he is the employer as much as I am. I also — Just a minute now. You asked me a question. I also knew that the acts and performance of these men would not be changed by this contract. I also knew that this contract was drawn up by some slick lawyers trying to avoid this tax question and pin it on to me.

Mr. Padway: I object to the answer as incompetent and I move to strike it as not responsive.

The Court: Overruled. (Intervener excepts).

Q. Did you know that the rules of the American Federation of Musicians were binding on you?

A. They were binding on me and also on the orchestra leader.

Q. Now did you not read in this contract, this language: "It is agreed that all of the rules, laws and regulations of the American Federation of Musicians, and all of the rules, laws and regulations of the Local in whose jurisdiction the musicians perform in so far as they are not in conflict with those of the Federation, are made a part of this contract." [fol. 194] Did you read that in the agreement at that time? A. Is that in the contract?

Q. Yes. A. I imagine I did.

Q. If you read it you knew it was there, didn't you?

A. Yes, I did.

Q. Wait a minute now. Well, I don't want to interrupt you. Do you want to say anything else?

A. No, I will let it go.

Q. You knew from Mr. Breyley that President Petrillo of the American Federation of Musicians had demanded these rules? A. This new contract.

Q. Yes, this new contract with all that was contained in there, you knew that, didn't you? A. That is right.

Q. And you exercised your objection to it?

A. Yes.

Q. Now you felt you could not employ these men unless you signed this contract?

Mr. Padway: That is all.

[fol. 195] Recross Examination.

By Mr. Cohen:

Q. Mr. Bartels, am I correct that the first time you made the objections was to Mr. Breyley on the Griff Williams' contract?

A. That's right. The contract at that time had just come out.

Q. Now I show you plaintiffs' Exhibit W, and ask you when that was executed?

A. That was executed on June 25, 1941.

Q. That was previous to that time, wasn't it?

A. That is right.

Q. So that you knew that there was this form of contract as early as June 25th?

A. That is not a Form B contract. I don't see any B on there, do you?

Q. Now, Mr. Bartels, doesn't this contract, plaintiffs' Exhibit W purport to state, does it not state that you are the employer and that you shall at all times have complete control of the services of the side men and the leader?

A. Yes.

Q. Now did you object to that?

A. I imagine I did.

[fol. 196]. Q. To whom did you object to that?

A. I think I crossed off a good many of those kind.

Q. You didn't cross off this one?

A. It didn't do any good, you either sign the contract or didn't get this man.

Q. I see. So that you did sign this contract on June 25, 1941, isn't that correct?

A. I imagine I may have.

Q. Well, did you object to the contract because you thought it was changing the status?

A. Changing the status how?

Q. That it made you the employer of these side men?

A. That's right.

Q. And yet you signed the contract, isn't that right?

A. I had to to stay in business.

Q. Well now you didn't believe that the contract was insignificant, that it didn't make any change in the status, is that right?

A. No, because the By-Laws of your Union say that the orchestra leader is the employer of the side men, and that makes him as much employer as these here paragraphs you put in on me.

Q. Now let me ask you, Mr. Bartels, am I correct that you objected to signing this contract because you thought [fol. 197] it changed the status? A. Yes.

Q. Now did you continue to think it changed your status and your relation to the musicians? A. I still do.

Q. And you did all the time, is that correct?

A. That's right.

Q. So that the assurance of Mr. Breyley didn't mean anything to you, is that correct?

A. I either signed or I didn't get the orchestra.

Q. In other words, you didn't believe Mr. Breyley when he said it didn't make any difference and your status remained the same. Am I right about that?

A. Yes, I took Jim's word for it.

Q. Did you believe it did not change the status or did you believe that it did change the status?

A. Oh, I didn't believe it did, no.

Q. Well, did you believe it did not change the status, why did you object to it, if you believed that?

A. Because I didn't want to be called the employer.

Q. Did Mr. — did anyone from the Vic Schroeder Agency tell you that the status was not changed?

A. No, I believe not.

Q. Well, at that time did you believe that the status was [fol. 198] changed so that you became the employer of these musicians?

Mr. Charlton: That is objected to as repetition, having been asked and answered exactly in the same form.

The Court: Well, I think it has, but we will take it once more and then we will quit.

(Question read by the reporter.)

Q. In other words, I am referring to the contract for the services of Paul Moorhead and his orchestra.

A. I will have to answer the same way, I have never contended that I am the employer of these divisions, these side men.

The Court: That is not exactly what he asked you.

Mr. Cohen: You answer my question, please.

(Question read by the reporter.)

A. You want me to answer whether my status had changed?

Q. I want to know whether on June 25, 1941, when you signed the contract engaging the services of Paul Moorhead and his orchestra you understood that the terms of the contract were such that you assumed the obligations of an employer to the side men and the leader of your orchestra.

A. I never have.

Q. Answer the question.

[fol. 199] A. No.

J. You didn't believe that? A. No.

Q. Well, did you object to signing that contract?

A. Yes.

Q. To whom did you object to signing that contract?

Mr. Charlton: Objected to as having been already asked and answered.

The Court: Sustained. (Defendants except).

Mr. Cohen: I am referring, if the court please, I am referring to the contract of June 15th.

The Court: Well, it has been — oh, you are referring to a different contract?

Mr. Cohen: Plaintiffs' Exhibit W.

Mr. Charlton: I think you will find that he —

The Court: Yes, I guess he has. You can answer. That is the other contract, the one that precedes the one you said you were raising the objection to.

A. Which one is it now?

Q. Paul Moorhead.

The Court: The one you said you didn't think was a B contract.

Mr. Cohen: That's right.

A. Yes, I objected to signing that.

[fol. 200] Q. To whom did you object to that?

A. I imagine it would be some one in Vic Schroeder's office, possibly Vic himself.

Q. When you signed that on June 25, 1941,—

A. That's right.

Q. Then you continued to sign contracts on July 7, 1941, on September 25, 1941, as well as July 12, 1941 and November 6, 1941, each with the same clause, is that correct?

A. Well, I think they are different contracts. I signed them, yes, I signed them.

Q. You signed them all?

A. But not as employer. I signed them because they insisted, I signed them but I denied I was the employer.

Q. We know you denied it, but you signed the contract?
A. Yes.

Mr. Padway: The answer that he denied he was the employer, we object to as incompetent, irrelevant and immaterial, and calls for a legal conclusion.

Mr. Cohen: I think I should object to that on the ground it is not responsive.

The Court: I think that is exactly what you asked him. It is too late now, we will let it stand. I think he has made the same statement several times.

[fol. 201] (Intervener and defendants except).

Recross Examination.

By Mr. Padway:

Q. Mr. Bartels, that conversation you had with Breyley about Petrillo and the adoption of this contract and the rules and all was had on the—

A. On what day. You say it was had by long distance telephone before the 26th of July, 1941, was the date you signed the contract.

Q. Was that the—

The Court: Which one are you talking about?

Mr. Padway: I am now talking about the Griff Williams contract, the first contract.

The Court: You went all over that a while ago.

Mr. Padway: Just a preliminary question.

Q. Directing his attention to that conversation, when was the conversation had?

A. It would be some time before I signed it. I don't know just what day.

Q. You don't claim to have had some conversation in connection with the Buddy Fisher contract?

A. When was that contract?

Q. That contract was signed on the 6th of November—no, no. I beg your pardon. Yes, 6th of November, 1941.

[fol. 202] A. Oh, I think I testified it wouldn't do any good. We would have signed this or we didn't get the man.

Q. So that you didn't raise that question then?

A. No.

Q. You didn't raise it on the 12th of July, 1941, Bill Carlsen, you didn't raise it then?

A. I may have raised it, but I know it was not as serious as the first one.

Q. You say you may have raised it. I don't mean raising an objection, did you have any conversation with the agent in which he said it doesn't make any difference?

A. No.

Q. And you didn't have any such conversation with the contract of Buddy Fisher? A. No.

Q. With that agency. You didn't have any such conversation with the Boyd Raeburn contract, did you?

A. No.

Q. And you didn't have any such conversation with Paul Moorhead contract, is that correct?

A. I may have had one of them.

Q. Well, you may have. Do you know whether you did?

A. I don't recall it right now.

Q. So that the only conversation you recall of any con- [fol. 203] versation and as related by you without going over it, is with respect to the Griff Williams contract?

A. That's right.

Q. That's right, isn't it? A. That's right.

Mr. Padway: That's all.

Redirect Examination.

By Mr. Roberts:

Q. I will ask you, Mr. Bartels, if you didn't on other occasions during this same period, during July and August have conversations with these other booking agencies protesting to the form? A. I did.

Q. And what did they tell you as to whether you could secure the Band?

Mr. Padway: Objected to, first of all it is a collective question pertaining to several contract forms.

The Court: I think you are right about that. Sustained. You will have to specify if you want to go into that. (Plaintiffs except).

Q. Now did Mr. Breyley tell you on the occasion of this conversation that we have been inquiring about, that you could not employ these men, was it that you could not sign, could not get the Band, just what was his response? [fol. 204] A. He said I couldn't get the Band without signing this contract.

Q. If you answered on cross-examination that the word employ—a question in which you used the word "employ," did you understand that is what Mr. Breyley said? I will withdraw that. Nothing more.

Mr. Cohen: I have no further questions.

Mr. Padway: No further questions.

Witness excused.

The Court: The reporter and I had a meeting and we decided to stop early this afternoon for our own reasons, and we will adjourn at 4:30.

Mr. Roberts: This witness, with permission of Government's counsel, is being called in the Geer case which is a combination case.

The Court: That is all right.

[fol. 205] AL MENKE, called as a witness on the part of the plaintiffs, and being first duly sworn by the Clerk, testified as follows:

Mr. Charlton: The record will be indistinguishable in any material or substantial way in the two cases. It is unfortunate we ~~have to call a~~ lot of witnesses and make a lot of record which will be virtually identical in the two cases, but I don't know whether there is any way to avoid it or not.

Mr. Cohen: I merely mentioned whether the testimony of this witness could be bodily taken out and put in again in the Geer case, so that all of the Bartels' testimony will follow along subsequently.

The Court: I understood from counsel that there was an agreement that this man's testimony might be taken out of order.

Mr. Cohen: That is true, but I thought after it was taken the reporter could then take it out.

The Court: Oh, well, that is between you and the reporter.

Mr. Cohen: Well, just intermingle them—

The Court: All right, proceed, please.

[fol. 206] Direct Examination.

By Mr. Roberts:

Q. Will you give your name to the reporter?
A. Al Menke.
Q. Where do you live, Mr. Menke?
A. Fairmont, Minnesota.
Q. Did you come here in response to a subpoena?
A. Yes.
Q. What business were you in during the year 1942?
A. Owner of a dance band, or orchestra.
Q. That was an orchestra identified as Al Menke and his Orchestra? A. And his orchestra, yes.
Q. Who first assembled the orchestra? A. I did.
Q. When was that? A. 1914.
Q. Can you tell us the place? A. Bancroft, Iowa.
Q. Have you continued to own and operate that orchestra since that time all down to 1942?

Mr. Cohen: Now, if the court please, I want to object with regard to ownership, which is a legal term and calls therefor for a legal conclusion.

[fol. 207] The Court: Overruled. (Defendant excepts).

(Question read by the reporter.)

A. Yes.
Q. When was the orchestra first known as Al Menke and his Orchestra? A. 1914.
Q. It has been continuously known by that name ever since? A. Yes.
Q. Now during that period of time that orchestra has been in existence, its performances have consisted mostly of playing of popular dance music? A. Yes.

Q. Just tell the court what types of establishments and organizations that your orchestra has played for in the years it has been in existence?

A. Oh, ballrooms, hotels, theatres, and so forth, cafes.

Q. What about colleges and High School classes?

A. Yes, private dances, Legion dances.

Q. Elks Clubs? A. Yes.

Q. In what part of the country has your orchestra played these engagements?

A. Oh, Minnesota, Iowa, Wisconsin, South Dakota, Colorado.

Q. Has the orchestra ever played over the radio?

A. Yes.

[fol. 208] Q. Now do you recall supplying some engagements for the Larry Geer Ballroom during the year 1942?

A. Yes.

Q. I will hand you what the court reporter has marked Exhibit A and ask you to examine that document and tell the court if your signature appears thereon? A. Yes.

Q. Is that a contract for an engagement by your orchestra at the Laramar Ballroom, Fort Dodge, Iowa?

A. Yes.

Q. On Thursday, November 26, 1942? A. Yes.

Q. The date of that contract is November 23, 1942?

A. Yes.

Q. Handing you what the reporter has marked Exhibit B, I will ask you to examine that contract and tell the court if your signature appears any place thereon?

A. Yes.

Q. And is that contract dated October 7, 1941, for engagements on the dates of October 12, October 18, and November 8th of 1941? A. Yes.

Q. Did you prepare the printed form of either contract Exhibit A or the contract Exhibit B?

[fol. 209] A. Yes.

Q. I mean did you prepare the printed form?

A. Not the printed form. This is the Form B contract I got from the Union, but I made the fill-in.

Q. When did you first start using the form contained in each one of these contracts, can you tell the court that?

A. Oh, in the summer I would say of 1941.

Q. Can you tell the court how you started to use that Form B contract and how you happened to start using it?

A. Oh, if I remember right the old forms were called in and new ones sent out.

Q. Who did that?

A. I got them through my local secretary at Mankado.

Q. Local secretary of what?

A. Local Musicians Union.

Q. Local Musicians of course of the American Federation of Musicians? A. Yes.

Q. Will you just tell the court in a general way how these engagements were made with Mr. Geer, the engagements that you had?

A. I either called him by long distance telephone or sent him letters, correspondence, telling him what dates I had open and what I would like to play for him.

[fol. 210] Q. I will hand you what the reporter has marked Exhibit C and ask you if that is the letter dated November 23, 1942, Mr. Larry Geer, Fort Dodge, Iowa, signed by you?

A. Yes.

Q. And that letter has to do with the closing of the contract for the engagement of November 26th?

A. Yes.

Q. And at the Laramar Ballroom?

A. Yes.

Q. That is the engagement mentioned in the contract Exhibit A?

A. Yes.

Q. Had you ever played the engagement for the Geers prior to the four specified in the contract?

A. Yes.

Q. How many years had your orchestra been playing in the Geer Ballroom?

A. Oh, I would not say. I would say for fifteen or sixteen years.

Q. Were you always the owner that played for the Geers? A. Yes.

Q. And prior to the use of the Form B contract, you used various form contracts, is that right?

[fol. 211] A. Yes.

The Court: I am sorry that we cannot get down with this witness—

Mr. Padway: Would counsel be kind enough, we made arrangements to go home tomorrow. How many witnesses

you have got, and just about what time it would take to put in your case; what does Your Honor plan as to the hours?

The Court: Start at 9:30 and 2:00 to 5:00.

Mr. Roberts: I believe we can get our evidence in tomorrow, but I don't know about the arguments.

Mr. Padway: We won't have very many witnesses and I don't believe we will have more than one and a stingy one at that.

The Court: Well, we will take whatever time we need. I am sorry we cannot go into a contract with you, but this is a good town. We will adjourn now until 9:30 tomorrow morning. (4:30 p. m.)

[fol. 212] Morning Session, December 12, 1944,

9:30 A. M.

Mr. Padway: If the court please, would it be well now to ask your Honor what procedure you have in mind in respect to this case? In the first place, this witness testified as a witness in the Geer case; is that correct?

Mr. Robert: That is correct.

Mr. Padway: And the witness will not appear in the Williams and other cases?

Mr. Roberts: That is right.

The Court: Then I understand that the evidence taken in one of these cases shall not be applicable to the other case at all? Is that the agreement of counsel?

Mr. Padway: The evidence taken in the Geer case shall not be applicable to any other case.

The Court: Generally when we try consolidated cases the evidence applicable to both cases is to be so considered by the court. I understand that is not the understanding in this matter?

Mr. Charlton: There is no such agreement. I think Mr. Padway, not being of record in the Geer case, and not hav-

ing intervened, but being of record in the Bartels case has no interest in the Geer case as such. But the causes having [fol. 213] been consolidated, all relevant evidence in both cases should be considered by the court, and we do not intend to waive that proposition.

Mr. Padway: Now the evidence in the Geer case is another case, and our understanding is what has been done in the Geer case and what becomes a part of the record has no bearing on the Bartels case any more than the Bartels case has any bearing on the other case.

The Court: I never tried a case of that kind. There would not be any advantage in consolidation unless the evidence is applicable to both cases, and that it shall be so considered by the court if it is competent. Generally in consolidating cases we make the order that all evidence applicable and competent in the hearing at all shall be considered by the court in all the cases. Of course, it [in] more or less a matter of agreement between counsel.

Mr. Padway: I was under the impression that the testimony taken would not become a part of the record in the Bartels case—the testimony in the Geer case.

Mr. Roberts: My [understand] from what we talked last night was if the evidence was relevant and competent [fol. 214] in both cases it should be considered by the court.

Mr. Padway: If that is the situation would I be permitted to cross-examine this witness because he then becomes a witness in the Bartels case, and if that evidence is to be considered in the Bartels case we ought to have an opportunity to cross-examine him.

The Court: That is reasonable.

Mr. Padway: Suppose we go on as Your Honor wants it to go on, and then we can get together and decide what we want to do. If we cannot agree then whatever the court rules on it is all right.

Mr. Charlton: That is all right.

The Court: I don't care. If you want to try one case at a time it makes no difference to me, but the very purpose of consolidation is to save time.

Mr. Padway: After the Bartels case is finished, then we can have a short argument, and we can pick up our grips and go. We were going to ask an opportunity of the court to present briefs. I am not going to take any great length of time. The reason that we are doing that is that the $20.00 involved in this case is not material for the reason that it [fol. 215] may develop into millions instead of $20.00.

The Court: There will be no trouble about that. We will go ahead with this witness, and if there is any matter in his evidence that you want to cross-examine on, of course, you will have that right. As bearing upon your case, if you want to develop it, I will give you plenty of opportunity to do that.

Al Menke, being recalled as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

By Mr. Thomas B. Roberts:

Q. Mr. Menke, I believe you testified yesterday afternoon that your orchestra played engagements at the Larry Geer ballroom in Ft. Dodge on October 12th and 18th, and November 8th and 26th, 1941; and also an engagement on November 26th, 1942; is that correct?

A. Yes.

Q. State whether or not your orchestra in playing those engagements had any particular style of music?

A. Well, we had a decided style for dance purposes in the Laramar Ballroom that we tried to keep.

Q. Now in order to produce that style what, if anything, did you do?

[fol. 216] A. I hired a leader and sidemen to play what I wanted.

Q. Anything else?

A. Buy music to serve that purpose and arrangement with orchestras that were necessary to produce the desired result.

Q. That being the particular style of music that your orchestra played on those occasions, is that right?

A. Yes.

Q. What can you tell us as to whether you held rehearsals for that purpose?

A. You mean for those jobs only or in general?

Q. In general?
A. Yes, we held regular rehearsals.
Q. That would be in advance of this engagement?
A. Yes, sir.
Q. You mentioned hiring the sidemen and the leader. From that I gather that you did not lead your orchestra; is that right?
A. No.
Q. You hired somebody to do that?
A. Yes.
Q. Now how long in advance of these engagements did you hire the sidemen and the leader?
A. Well, it all depends. Some men for a number of years, and others not so long.
[fol. 217] Q. Can you tell us the names of any men that you had for sometime prior to these engagements?
A. I had Carl Orser for 16 years.
Q. He has been with you 16 years?
A. Sixteen years.
Q. You hired him in the first instance?
A. Yes.
Q. Anyone else?
A. Paul Hostetler.
Q. How long had he been with you?
A. Sixteen years.
Q. Anyone else you recall?
A. I hired Johnnie Glazer as leader at that time.
Q. How long had he been with you?
A. About five years.
Q. Now at the time you hired these various men, did you have any conversation with them?
A. Well, other than to tell them that they were to play what I wanted, no.
Q. Anything discussed about their pay?
A. Yes.
Q. Did you tell them what you would pay them?
A. Yes.
Q. Who determined the number of men in the orchestra?
A. I did.
[fol. 218] Q. Now, I presume over a period of years I think you testified yesterday your orchestra had been in existence since 1914; is that correct?
A. Yes.

Q. You sometimes had occasion to get rid of a man?
A. Yes.
Q. Who told the man to leave the orchestra?
A. I would.
Q. In other words, you discharged him?
A. Yes.
Q. Some man wanting to leave the orchestra, would he come to you?
A. Yes.
Q. He would tell you that he wanted to leave the orchestra? A. Yes.
Q. Now you mentioned something about picking the library, or picking the arrangement, did you have a music library for your orchestra? A. Yes.
Q. Who picked out the pieces in that library?
A. I did.
Q. Who paid for those pieces? A. I did.
Q. What can you tell the court as to whether that library contained arrangements of various popular parts of [fol. 219] dance pieces?
A. Yes, dance numbers, yes.
Q. Did you ever request anyone to make arrangements for your orchestra? A. Yes.
Q. And then you paid them, of course, for their services?
A. Yes.
Q. Are you a musician yourself, Mr. Menke?
A. Yes.
Q. What instrument do you play? A. Saxophone.
Q. During the period of time your orchestra was in existence did you play with the orchestra part of the time, some of the time?
A. Some of the time, yes.
Q. Now you mentioned something about the instrumentation; can you tell us about that; who determined that?
A. I did.
Q. Tell the court what you mean by determining the instrumentation?
A. Well, to have the band that I wanted I would try to get certain instrumentation, such as five saxophones or four brass, or whatever I would want and try to keep my men within the number of men listed on the contract, of course, and I would have to have my instrumentation come

[fol. 220] out with that so I would have as many men as the contract called for.

Q. Did the orchestra have a theme song? A. Yes.

Q. Who selected that? A. I did.

Q. Can you tell whether that was played at the beginning of an engagement? A. Well, usually.

Q. Usually was? A. Yes.

Q. That was true in '41 and '42? A. Yes.

Q. Incidentally, did you have any slogan for your orchestra? A. Yes.

Q. What was that slogan?

A. "Band of a Million Friends."

Q. Was that used in the advertising? A. Yes.

Q. Did you send advertising of some kind to the different establishments in the territory that your band played in? A. Yes.

Q. Who paid for that advertising? A. I did.

[fol. 221] Q. That would be placards, pictures and circulars? A. Yes.

Q. Did you have any feature performers with your orchestra?

A. I usually had one or two vocalists, or drummer.

Q. Did you have any such performers in 1941 and '42?

A. Yes.

Q. Who selected them? A. I did.

Q. Who worked them into the orchestra, that is their place?

A. I did through the arrangements.

Q. Through the arrangements? A. Yes.

Q. Would you and the leader confer together as to how they would take their vocal chords, etc? A. Yes.

Q. You mentioned something about rehearsal; who determined the time of that rehearsal?

A. I, or the leader.

Q. And if the leader did under whose direction was he acting? A. Mine.

Q. As a matter of fact in his conducting of the orchestra whose direction was he under? A. Under mine.

Q. During these rehearsals would you make suggestions [fol. 222] as to what the orchestra was doing? A. Yes.

Q. Criticize them when playing the pieces? A. Yes.

Q. And try to work out harmonies and chords?

A. Yes.

Q. That was true during 1941 and 1942? A. Yes.

Q. What can you tell us whether your orchestra used any music racks during this playing at the Laramar Ballroom during 1941 and 1942? A. Yes.

Q. Who furnished those? A. I did.

Q. What can you tell the court whether the orchestra used a public address system on the occasion of each of those engagements? A. Yes, we did.

Q. Who furnished that? A. I did.

Q. Now did your orchestra members and the leader wear any particular attire on the occasion of each of those engagements? A. Yes.

Q. Who selected that attire?

[fol. 223] A. I usually did.

Q. Now what, if anything, did the orchestra travel in? I believe you said your headquarters was Fairmont, Minnesota? A. Yes.

Q. How did you travel to go to Ft. Dodge, Iowa, for these engagements we have inquired about?

A. We had our own orchestra bus.

Q. Who bought that bus? A. I did.

Q. In whose name was it registered? A. In my name.

Q. What can you tell us as to whether you had liability insurance on your bus? A. Yes.

Q. Who paid for that? A. I did.

Q. What can you tell the court as to whether you had your name on it? A. Yes.

Q. In large letters? A. Large letters, yes.

Q. Just what did they state?

A. "Al Menke and His Orchestra."

Q. Who paid for the gas and oil and tires used in these [fol. 224] engagements? A. I did.

Q. And who paid for the repairs? A. I did.

Q. You charged that up to the expense of the orchestra, did you? A. Yes.

Q. Now you received some money for each of these engagements; is that correct? A. Yes.

Q. Can you tell the court the amount you received?

A. Received $250.00 for November 26th, and $120.00—

Q. What year?

A. 1942. And $120.00 for each engagement of October 12, October 18, November 8th and 26th, all in 1941.

Q. To whom was that money paid? A. To me.

Q. That is you were the one that ultimately received it? A. Yes.

Q. Did you put it in some bank account? A. Yes.

Q. The account carried in your name? A. Yes.

Q. Now you mentioned earlier in your examination that you discussed the pay with the sidemen as to how you [fol. 225] paid your sidemen and the leader? A. How?

Q. Did you pay them by the week or day?

A. By the week.

Q. By the week? A. By the week, yes.

Q. Some weeks did you have off nights when the orchestra did not play? A. Yes.

Q. What can you tell the court whether you deducted anything from the wage of the sidemen?

A. Never, not for off nights.

Q. What can you tell the court as to whether that weekly wage that you paid the sidemen and the leader was higher or lower than the union scale throughout the territory?

A. Always higher.

Q. You always paid higher than the union scale?

A. Yes.

Q. What can you tell the court whether you paid the leader more than the sidemen? A. Yes.

Q. That was because he had to know more, is that right?

A. Yes, and had more responsibility.

Q. In handling the men? A. Yes.

[fol. 226] Q. Did you pay all of your sidemen the same amount? A. No.

Q. Tell the court about that?

A. Well, I will pay the first saxophone man, and first drum man more than I would the second or third man, if that is what you mean.

Q. Would you give them a raise from time to time?

A. The longer they would be with me the more I would give them a raise.

Q. What was the custom to pay these sidemen and the leader? A. Check.

Q. Check made to each man? A. Yes.

Q. That would be for the amount you had agreed to pay them? A. Yes.

Q. All of this was true during 1941 and 1942?

A. Yes.

Q. Did you have a payroll? A. Yes.
Q. You made up that payroll each week? A. Yes.
Q. During 1941 and 1942? A. Yes.
Q. Now what can you tell us as to whether you paid unemployment compensation tax to the State of Minnesota [fol. 227] during the years 1941 and 1942 on the sums of money you paid the sidemen and the leader? A. Yes.
Q. What can you tell us as to whether you build up a merit rating under their law? A. Yes.
Q. Tell the [about] about that?
A. In Minnesota, I don't know if they have it in Iowa or other State, but in Minnesota we have a merit rating system that the employer will have a merit rating after building up to a certain percent and my present rating is as low as you can get it.
Q. You build that up—
A. As soon as you become an employer.
Q. Do you recall when you first became an employer up there?

Mr. Cohen: We object to that as incompetent and immaterial to any issue in this case as to what the State of Minnesota considers an employer. The only question here is whether he was covered under the federal law.

The Court: We will take it subject to the objection. (Defendant excepts).

A. Under the Minnesota State law—when?
Q. Yes?
A. Whenever it went into effect during the year.
[fol. 228] Q. Prior to 1941 and 1942? A. Yes.
Q. What can you tell the court as to whether during 1941 and 1942 you paid social security taxes to the United State Government of United States Treasury on the sums you paid your sidemen and the leader? A. Yes.
Q. That was true on the wages you paid these men during the weeks in which these engagements inquired about were played, is that right? A. Yes.
Q. Now what can you tell the court after paying sidemen and the leader and the traveling expense and your bus expense was there any money remaining from the sum you received as the contract price for the engagements specified in Exhibits A and B?

A. That depends entirely on how many nights we worked that week, which I would not recall unless I looked up my record. I paid by the week and if I did not work I probably would not have a profit, and then if I worked seven nights I would have a profit.

Q. If you had a profit who received that?

A. I did.

Q. The sidemen did not receive any of that, did they?

A. No.

[fol. 229] Q. Suppose during the week you had a loss. Were there times you had a loss? A. Yes.

Q. Who stood those losses? A. I did.

Q. You still paid the sidemen, and their expenses?

A. Yes.

Q. What can you tell the court as to whether you included the profit from the week's engagement in your federal income tax? A. Yes.

Q. What can you tell the court as to whether you took deduction as pay roll expense the amount you paid the sidemen and the leader? A. Yes.

Q. In our federal income tax return? A. Yes.

Q. That was true during 1941 and 1942?

A. Yes.

Q. Now you mentioned paying social security tax, did you pay social security tax on the week y salary or on the amount shown on the reverse side of Exhibit B?

A. I paid the social security tax on the weekly salary.

Q. Now, Mr. Menke, you have testified that you paid the men, or you made no deduction from their salaries if [fol. 230] they had an off night. Did you ever pay a man during the time he was laid up from an accident?

A. Yes.

Q. Tell the court about that?

A. Well, it was not in 1941 or 1942.

Q. Tell the court when it was?

A. Well, we had an accident in 1936 when a man had a broken leg and was laid up from February until July.

Q. Whereabouts? A. Rochester, Minnesota.

Q. Did you pay him during the period he was laid up?

A. Yes.

Q. Did you pay anything else?

A. Paid his salary and expenses.

Q. What did his expenses amount to?

A. $3000.00.

Q. You paid his hospital and doctors bill or expenses?

A. Yes.

Q. Were you during 1941 and 1942 a member in good standing of the American Federation of Musicians, and were all of your orchestra members in good standing in the American Federation of Musicians during the years 1941 and 1942? A. Yes.

Q. Was that true also of the leader, Mr. Glazer?

[fol. 231] A. Yes.

Q. What difference was there, if any, between the way your orchestra was operated before June 1, 1941, and the way it was operated afterward? A. None.

Q. What differences were there in your manner of dealiny with the Geers prior to June 1, 1941, and afterward?

A. None whatsoever.

Q. You operated just the same? A. Yes.

Q. The only difference is you had a different form of contract; is that right? A. Yes.

Q. Some time after the middle of 1941? A. Yes.

Q. What can you tell the court as to whether or not during the years 1941 and 1942 you permitted an establishment owner to direct or instruct the sidemen of your orchestra? A. Will you repeat that?

Q. (Question read by the reporter).

A. No, they did not.

Q. You did not permit that?

A. I did not permit that, no.

Q. Did you permit establishment owners during those

[fol. 232] years to determine the instrumentation or arrangement? A. No.

Q. What table or style of music? A. No.

Q. Did you permit them to determine your weekly salaries that you paid your sidemen? A. No.

Q. Did you permit them to hire or fire the sidemen?

A. No.

Q. That is, the establishment owners for whom you played in 1941 and 1942? A. No, I did not.

Q. I believe you testified yesterday that your signature appears on Exhibits A and B? A. Yes.

Q. And also on Exhibit C? A. Yes.

Mr. Roberts: Plaintiffs at this time offer in evidence Exhibit A.

The Court: Any objection?

Mr. Roberts: And Exhibits B and C.

The Court: No objection. They may be admitted.

Contract Blank

AMERICAN FEDERATION OF MUSICIANS

FILED

DEC 1 2 1942

Local No. 477

THIS CONTRACT for the personal services of musicians, made this 23rd. day of November, 1942

between the undersigned employer (hereinafter called the employer) and 13 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Al Lenke, according to the following terms and conditions:

Name and Address of Place of Engagement: Laramar Ballroom Ft. Dodge, Iowa

Date(s) of Employment: Thursday Nov. 26th. 1942

Hours of Employment: 9 PM to

PRICE AGREED UPON: 250.00

To be paid: after engagement (Terms and Amount)

(Specify When Payments Are To Be Made)

Filed in U. S.

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Larry Geer

Street Address Fort Collins Colo

City or State

Phone

Accepted by Employer Larry Geer

Accepted Al Menke
(Orchestra Leader)

By Al Menke
(Representative of Employees)

FORM B
Printed in U.S.A.

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Al Menke (Leader)	477	477-20-0707	$
Johnny Glaser	"	470-03-1542	
Larry Glaser	"	470-05-1995	
Karl Orser	"	470-10-3277	
Paul Hostetler	"	470-10-4579	
Richard Steele	"	284-12-1750	
Jimmy Gilbert	"	483-16-8028	
Robert Bissell	"	474-12-7788	
Gene Duermeier	"	507-16-0506	
Dale Anderson	"	480-18-1085	
Dick McNally	"	428-12-6339	
Kenny Kazebier			
Ray Long	477	185-14-7374	

travel from Fairmont
distance of 100 miles

Plaintiffs' Exhibit A.
Filed in U. S. District Court December 13, 1944.

Ours

Contract Blank

3x B
12/11/44

FILED
DEC 13 1944
N. F. Reed
CLERK

AMERICAN FEDERATION OF MUSICIANS

Local No. 477

THIS CONTRACT for the personal services of musicians, made this 7th. day of October, 1941.

between the undersigned employer (hereinafter called the employer) and 12 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Johnny Glaser, according to the following terms and conditions:

Name and Address of Place of Engagement: Laramar Ballroom Fort Dodge, Iowa

Date(s) of Employment: Oct. ~~12th.~~ Oct. ~~18th.~~ and Nov. ~~8th.~~ all 1941

Hours of Employment: 9 P.M. to 12P.M.

Sun hours 8 45 pm to 12 15 am
Sat " 9 pm to 12 M

PRICE AGREED UPON $ 120.00 per date
(Terms and Amount)

To be paid after each engagment
(Specify When Payments Are To Be Made)

Filed in U. S.

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer

Street Address

City or State

Phone

Accepted by Employer

Accepted Johnny Glaser
(Employer)

By Al Menke
(Representatives of Employees)

FORM B

Printed in U. S. A.

Plaintiffs' Exhibit B.
District Court December 13, 1944.

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NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Johnny Glaser (Leader)	477	470-03-1542	10.00
Leon Ortyl	"	170-05-1994	5.00
Karl Orser	"	470-10-3277	5.00
Paul Hostetler	"	470-10-4579	5.00
Fred Baranyai	"	470-051996	5.00
LeRoy Hawkins	"	470-05-1907	5.00
Larry Glaser	"	470-05-1995	5.00
Loren Helberg	"	328-18-6127	5.00
Frank Crebshaw	"	484-07-[illegible] 1121	5.00
Winton Churchill	"	475-16-[illegible] 2413	5.00
Richard Steele	"	284-12-1750	5.00
Claude LePuc	"	483-12-4969	5.00

Plaintiffs' Exhibit B.
Filed in U. S. District Court December 13, 1944.

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Telephone 770

AL MENKE ORCHESTRA 1000000 friends

315 Lake Park Boulevard Fairmont, Minnesota

11/23/42

FILED
DEC 1 2 1944
N. F. Reed
CLERK

Mr. Larry Geer
Fort Dodge, Iowa

Dear Larry:

Enclosed please find the contracts for Nov. 26th. and will you please file with union.

In regard to later dates you mentioned, I may have January 2nd.1943 open. Since we will open at Denver on January 7th. 1943 later dates will be out for some time. I am enclosing a circular about the Denver job, of five months. However, if at all possible, I want to retunr here at Easter and of course, I will know after we get there just how the gas rationing etc. will work out. Also the war. I feel that this war may not last as long as some people seem to think and I want to be here or in the territory, when it is over.

Filed in U.

Do you have any special holiday dances around the 29th. or 30th. of December? I will have 14 pieces at that time(adding a girl singer only) and if you have anything at that time I will be glad to play it for you. Also about the date of Tuesday night January 5th.1943. I have you down for this night at Storm Lake and plan to go out to Denver ~~there~~ from there, but I havn't satisfied myself that two days will give me enough time to travel. Will it be OK to let you know definitely on t is a little later?

I will see you Thursday and following are the dates that I have with you:

Nov. 26 Ft. Dodge Nov. 28th., Storm Lake
Dec. 8th. Storm Lake Dec. 25th. Ft. Dodge. Dec. 26th. Storm Lake

then Jan. 5th. Storm Lake(?)

Kindest Regards

- Al Menke

Plaintiffs' Exhibit C.
S. District Court December 13, 1944.

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[fol. 238] Q. You have been in the dance orchestra business for how many years? A. Thirty years.

Q. You are familiar with the practices of dance orchestras? A. Well, I hope so.

Q. Well, you are; is that true? A. Yes.

Q. Some times didn't you play engagements on what is known as a percentage of the profit? A. Yes.

Q. During 1941 and 1942? A. Yes.

Q. Tell the court what that is?

A. Well, you get a guarantee of a certain amount agreed upon with a percentage of the profit.

Q. With the establishment owner?

A. Of the receipts, yes.

Q. If you entered into a percentage of the profit arrangement what does that mean?

A. That means that I might get a little more money than the contract called for.

Q. It would run over the guarantee?

A. It would run over the guarantee.

Q. Would your sidemen get any more money in that case? A. No.

Q. Or the leader? A. No.

Q. His wage remained the same as you had determined [fol. 239] for that week? A. Yes.

Q. What can you tell the court as to whether the practices you have described are typical of the practices of persons who have organized dance orchestras?

Mr. Cohen: I object to that question. I don't think the witness is qualified to give an answer to a question of that kind.

The Court: How long have you been in the business?

A. Thirty years.

The Court: It seems to me he ought to know about that. You mean in his neighborhood or that he has had contact with?

Q. In the territory in which your orchestra played engagements? A. Shall I answer?

The Court: Yes. (Defendant excepts).

A. The orchestras that I come in contact with are, any number of them are good friends of mine, and they all

operate the same that I do, I know that. We have had general discussions and conversations on the different ways of operating bands, and they all seem to operate the same way.

Mr. Roberts: That is all.

[fol. 240] Cross-Examination.

By Mr. Harold D. Cohen:

Q. Does your orchestra operate in the same way that Blue Barron and His Orchestra operate?

A. I don't know Blue Barron personally.

Q. Does it operate the same way as Paul Whiteman and his orchestra?

A. I don't know Paul Whiteman personally.

Q. Does it operate the same way as Griff Williams' orchestra? A. I don't know.

Q. There are many orchestras that operate in this territory whose practices you do not know? A. Yes.

Q. Now, Mr. Menke, I think you stated on direct examination that you performed on October 12th and 18th., and November 8th and 26th, 1941. Can you state whether you performed on November 26th, 1941?

A. November 26th, 1941? I would not know unless I looked at my contract, or booking record.

Q. You don't know whether you did operate on that date? A. Not unless I looked up the record.

Q. Mr. Menke, I believe you stated you signed both of these contracts, Exhibits A and B; is that correct?

A. Yes.

Q. Did you read them when you signed them?

[fol. 241] A. Yes.

Q. Did you understand what was in them? A. Yes.

Mr. Cohen: I have no further questions.

The Court: Anything further with this witness?

Redirect Examination.

By Mr. Thomas B. Roberts:

Q. Mr. Cohen asked you about Paul Whiteman. What can you tell the court as to whether his orchestra operates regularly in this territory? A. No, does not.

Q. You are familiar though with most bands that do operate regularly in this territory?

A. What we call territory bands, yes.

Mr. Roberts: That is all.

Witness excused.

Mr. Charlton: I thought we were doing just as we did in the Cole case. We tried the first case and closed it and then agreed that all of the evidence in the first case should be applicable to the second, and that worked out very fine in both those cases, and I thought that was the way we were doing here, and that would leave Judge Padway's case where it belonged, with the first and second case in.

[fol. 242] Mr. Padway: I have no objection to that.

Mr. Charlton: If Mr. Padway were representing the defendant he would be in both cases. However, I don't believe an intervening party should require a repetition of evidence. The advantage of consolidation in these cases, if any, is the use of applicable evidence in both of them. We do not feel that relative evidence which applies equally to both cases should have to be repeated and gone over again and again in this consolidated trial. We feel, however, Your Honor is perfectly right in granting the right of cross-examination, and we make no objection to cross-examination by intervener's counsel of any witness in the Geer case.

Mr. Padway: As I understand it, I don't think there is much difficulty. Let us see if this will satisfy you, Mr. Charlton. Whatever was said in the Griff Williams case and appears of record is applicable to the Geer case, but the Geer testimony is not applicable to the Bartels case.

Mr. Charlton: We do not agree, Your Honor, and I don't think it is the purpose of consolidation of the cases. I make no objection, and I invite counsel for the intervener to cross examine these witnesses to his heart's content and the making of such record as he thinks the facts warrant [fol. 243] so far as the facts are concerned which are applicable in both cases.

The Court: It seems to be that the consolidation for trial carries with it the right of either party to introduce evidence that may be applicable to both cases, and when so

introduced and the evidence is competent and relevant to either one of the cases, and also competent and relevant to another case, it looks like the court should consider it as such, and not require the evidence to be taken over in the two cases, and I will make an order that that procedure will be followed, unless counsel for either the intervener or defendant, any of the defendants, object to that. If they do we will try them one at a time. These are important matters, and if there is any reason why the right of the court to consider any relevant and competent evidence applicable to all the cases as consolidated should not prevail let us say so now and we will try them one at a time.

Mr. Padway: We want to get through, if that is within the regular procedure. I don't want to lumber up the record. We will say now that the situation would not be so difficult if the testimony given by Mr. Menke was applicable to his own case, but otherwise a good deal of it was incompetent, for some of it is in different territory, and I don't see how it could be considered competent in the Bartels [fol. 244] case; that is the reason for it. If Your Honor thinks this can be reached in this way by agreement on our part that the testimony when relevant may be considered in both cases—

The Court: Relevant and competent.

Mr. Padway: But how can the court say that certain evidence is to be considered?

The Court: It is up to the court to determine what is relevant and competent evidence. It is up to the court to determine what is competent and relevant evidence applicable to both cases.

Mr. Padway: If it is competent in one case I understand the court is going to consider it in the other case. If it is relevant in one case it may not be in the other. It is a question with me whether he can do that or not as a practicable matter. But it occurs to me that Menke, in his position, he is a different kind of a contractor; he is not a band leader; he goes out and hires a leader.

The Court: If the evidence is not competent in the Bartels case we will not consider it; if it is, we will.

Mr. Padway: I think the decent thing to do is to abide by the ruling of the court as facilitating both the trial and [fol. 245] the decision, if the court is to determine what is competent. So let it go at that, the court having ruled that the cases are consolidated, and what is competent in one case is to be considered competent in the other case, and what is incompetent in one case is to be considered incompetent in the other case.

Mr. Cohen: In the event that it is necessary to take the case up, say an appeal should be taken in the Bartels case and not in the Geer case, would not the record not contain many matters which the court would feel they were not interested in?

The Court: That would be for the attorneys to decide. They would only take up that which would be relevant to show in the [appelate] court. You do not have to take up everything that is introduced. Don't try to get me to advise what you are going to put in the record on appeal. That is another thing that I do not worry about.

Mr. Cohen: The record would not show which evidence this court considered material to the Bartels case?

The Court: Not unless I read it in the opinion. That is one thing we do not have to do, to pick out and consider everything that we considered in the evidence as might have a bearing upon the questions.

Mr. Padway: I now move that insofar as the interveners [fol. 246] are concerned in the Bartels case the evidence of Menke be stricken as incompetent, immaterial and irrelevant, and not bearing upon the issue in that case, and being based upon a contract relationship and agreement to which the Griff Williams and the other organizations involved in the Griff Williams suit and Bartels have no interest, connection, or relevancy or effect.

Mr. Charlton: Is your motion directed to the evidence as an entirety?

Mr. Padway: Yes.

The Court: That is what he said.

Mr. Padway: It is done on the theory you called him as a witness in the Bartels case as well in another. You can-

not do that in both cases under the stipulation. Now having settled the question of consolidation, he being a witness in the Bartels case as well as the other case, and having heard his testimony, I move that it be stricken as not being material, relevant or competent.

Mr. Charlton: Let the record clearly show that the witness Menke was called as a witness in the consolidated case. He was placed on out of order. The order would not have required him to testify at the time he did, and only in that respect was the witness unusual.

The Court: I think that should be overruled.

[fol. 247] (Intervener excepts).

([Recell] 10:30 to 10:40 A. M.)

Mr. Padway: I [wounder] if you would object. I would like to ask the witness Menke one or two questions.

The Court: Come forward, Mr. Menke.

Al Menke, being recalled, testified as follows upon

Cross-Examination.

By Mr. Joseph A. Padway:

Q. I came up from telephoning downstairs and I heard a question put to you and answered by you with respect to Griff Williams and his orchestra, whether you knew how Griff Williams operated, and I believe you said you did not?

A. I do not.

Q. Do you know how Paul Carlson and his orchestra operated? A. No.

Q. Did you know how they operated on or about August 17, 1941? A. No.

Q. Do you know how Tiny Hill and his orchestra operated? A. No.

Q. Did you know how they operated in September 1941?

A. No.

[fol. 248] Q. Do you know how Boyd Raeburn and his orchestra operated? A. No.

Q. Did you know how they operated October 5, 1944?

A. No.

Q. Do you know how Paul Moorhead and his orchestra operates? A. Yes.

Q. You do know how it operates? A. Yes.
Q. Did you know how it operated January 18, 1942?
A. Yes.
Q. Do you know whether he signed a Form B contract or not when he entered into an engagement with the Bartels people, the Crystal Ballroom?
A. By the record, he signed a contract.
Q. Did you ever talk with him about it?
A. About the contract, no.
Q. Did you know what he said when he entered into the contract, and what was said to him about it?
A. No.
Q. You do not know then what particular understanding there was between Bartels and Moorhead at that time?
A. No.
Q. When you say you know how he operated you are [fol. 249] judging from what you have heard from the things he done in the orchestra business, is that right?
A. That is right.
Q. That goes back to what year would you say?
A. I couldn't say for sure. It has been several years, five or six.
Q. You know when Form B came into existence in 1941, in June? A. Yes.
Q. You know how he operated before that time, don't you? A. Yes.
Q. Have you discussed with him how he operates since then personally?
A. That word operates covers—
Q. How he conducts his band?
A. Not only I know how he operates, he hires his men of the orchestra the same as I do mine.
Q. All you know about Moorhead is that he hires his men and pays them as you do?
A. By weekly salary.
Q. That is the only thing you do know?
A. That is what I do know.
Q. You don't know with what form of contract he operated on? A. No.
Q. You don't know the various contracts he entered into in 1941, '42, '43 or '44, do you?
[fol. 250] A. No.

Mr. Cohen: May I be permitted to cross-examine?

The Court: Yes.

Cross-Examination.

By Mr. Harold D. Cohen:

Q. Mr. Menke, I believe you stated—

Mr. Padway: I now renew my objection and motion on the same grounds as I made them before.

The Court: Overruled. (Intervener excepts.)

Q. Mr. Menke, I believe you stated on cross-examination previously that you you did not know the way in which Blue Barron and his orchestra operated; is that correct?

A. That is correct.

Q. Are you able to state whether you know how Jimmy Barnett and his orchestra operated?

A. No, I would not say that I do.

Q. Do you know the way Les Hartman and his orchestra operated? A. No.

Q. Do you know the way Doc Lawson and his orchestra operated on July 4, 1942?

A. I know all of those bands, and I know they all hire men on a weekly salary. Other than that I don't know anything of their different agreements on contracts with the different managements.

[fol. 251] Recross-Examination.

By Mr. Joseph A. Padway:

Q. You stated in response to a question put to you by Mr. Roberts that if there was a loss you would take the loss? A. Yes.

Q. Is that right? A. Yes.

Q. Now you employ an orchestra leader, I understand, to lead the band?

A. Yes.

Q. You are also a member of the American Federation of Musicians personally? A. Yes.

Q. You are familiar with the rules pertaining to the employment of orchestra leaders, and also sidemen?

A. Yes.

Q. You know then, don't you, that it was the rule in 1941— A. Yes—

Q. And is a rule now—

Mr. Charlton: That is objected to—

Mr. Padway: Let me finish the question.

Q. You know that it is a rule and was in 1941 that the orchestra leader must [receiver] in any arrangement that he made for services with any one the amount fixed [fol. 252] by the union in the locality where he works for leaders, and that the sidemen must likewise receive the amount stipulated for services by the local union where it operates? A. Yes.

Mr. Charlton: That is objected to, and may the objection precede the answer?

Mr. Padway: Yes.

Mr. Charlton: That is objected to as calling for the conclusion and opinion of the witness on a subject which according to the opening statements in this case would require him to be a mind reader of the mind of Joseph Petrillo, and not proper cross-examination.

The Court: Overruled. (Plaintiff except.)

Q. You know, do you not, Mr. Menke, that you are required by the rules of the American Federation of Musicians to arrange your pay for the music to be rendered so that it will cover transportation of the leader, transportation of the sidemen, and commissions to the booking agency, and leave a balance to be distributed, and when distributed will not be less than the scale fixed by the union for the leader and for the men, is that right?

Mr. Charlton: The same objection.

The Court: Overruled: (Plaintiffs except.)

[fol. 253] A. Yes. I—

The Court: What did you say?

A: Supposing on this—may I speak freely?

The Court: Yes. Sure.

A. Supposing I blow out two or three tires and I was on a job that I figured close to scale, and it will cost me $150.00 for tires on my bus, I am bound to lose no matter how much the contract called for.

Q. That loss would be what we might term an unforseen loss? A. Yes.

Q. So the union figures by their contract that in figuring the price you must have a price that when you have paid all necessary expenses like transportation, commissions and incidentals that are usual and necessary and can be anticipated will leave for the leader and the sidemen the union scale, is that right?

A. Yes; the boys always get the union scale.

Q. And the leader must get the union scale?

A. And the leader, but he is the one that may have a loss.

Q. You were an owner, you did not happen to be a leader, did you?

A. No. I am not a leader.

Q. I do not see on these contract, Mr. Menke, the name of a booking agency; did you have a booking company?

A. I booked them myself.

[fol. 254] Q. Are you familiar with the booking agency, the American Booking Agency?

A. When I say I book my own orchestra, I book my own except a few that I have had booked by an agency.

Q. You are familiar with the methods of booking agencies, you know that booking agencies that book bands are the same agencies that book stars and actors from Hollywood; is that right? A. Yes.

Q. And if a band takes along a feature artist and singer that same agency books that one on the reverse side of the contract Exhibit A, dated the 7th of October 1941. I notice that you have under the title, names of employes and number of men listed, and then you have Local No. 477; does that [man] the Local Union number? A. Yes.

Q. Of which they are members? A. Yes.

Q. Then you have the social security numbers?
A. Yes.
Q. Then you have another column headed wages?
A. Yes.
Q. I notice you have a name, Johnnie Glazer; who is Johnnie Glazer? A. He was my leader.
[fol. 255] Q. I notice he gets $10.00 for that night's work? A. On that contract.
Q. Whereas the sidemen, the other men, they receive $5.00 each?
A. Yes, that is correct.
Q. In the contract of November 23, 1942, plaintiffs Exhibit A, you have the leader listed, and the men listed, I don't see the wages set forth in the column, what were they paid, if you know? What was your leader paid?
A. I would not know.
Q. Have you at least a fair idea of what you paid the leader for the engagement?
A. No, I never paid for a single engagement. I paid a weekly salary at all times.
Q. Now this was not the weekly salary fixed by this nightly salary?
A. That is the nightly salary. The union requires that.
Q. Requires you to split it up?
A. When I file the contract sometimes I make a duplicate copy of it, and some times I didn't do it.
Q. Would you look at these contracts, the total amount and total men in here, and I would like you to tell me if you can whether the leader's salary would be much above the $10 you have in the other contract?
A. Much above the contract?
[fol. 256] Q. Yes?
A. There would be no way for me to give you an accurate figure on that.
Q. I don't care about the accuracy, but within a dollar or two?
A. I would not know about that.
Q. You would not say that it would go to $20 instead of $10.00? A. No.
Q. You would not say the men would get $5.00 instead of $10.00? A. No.
Q. Would it not be reasonable to infer that it would be close to that, within a dollar or two?

A. Possibly.

Q. The union does not prohibit the distribution of larger than the scale? A. That is right.

Q. It must not be below the scale? A. That is right.

Mr. Padway: That is all.

Witness excused.

[fol. 257] PAUL MOORHEAD, called as a witness on behalf of the plaintiffs, and first duly sworn by the Clerk, testified as follows:

Direct Examination.

By Mr. Thomas B. Roberts:

Q. Will you give your name to the reporter?

A. Paul Moorhead.

Q. Where do you live, Mr. Moorhead?

A. Omaha, Nebraska.

Q. What can you tell us as to whether or not your name was identified with an orchestra during the year 1941?

A. It was.

Q. What was the name of the orchestra?

A. Paul Moorhead and His Orchestra.

Mr. Padway: I can't hear you.

A. Paul Moorhead and His Orchestra.

Q. When did you first assemble your orchestra?

A. January 1926.

Q. January 1926; and where was that?

A. Omaha, Nebraska.

Q. Was that the first date it was known as Paul Moorhead and His Orchestra? A. Yes.

Q. Now during the period that your orchestra was in existence did its performances consist mainly in playing [fol. 258] popular dance music? A. Yes.

Q. What types of establishments did your orchestra play engagements for during the period it was in existence?

A. Well, I would like to say it is still in existence. It was Ballrooms throughout the middle west territory.

Q. Any other types of organizations that you played for, civic organizations?

A. If they were giving a dance.

Q. Social organizations? A. Just dance music.

Q. College fraternities? A. Yes.

Q. Your organization or orchestra was playing over the radio? A. Yes, sir.

Q. Do you recall that your orchestra played an engagement at the Crystal Ballroom, Dubuque, Iowa, in January 1942? A. Yes, I do.

Q. I will hand you, Mr. Moorhead, what the reporter has marked Exhibit W, and ask you if that is the contract for your orchestra engagement at that Ballroom on that date, January 18th, 1942?

[fol. 259] A. Yes, that is right.

Q. Did you have a broker at the time this engagement was entered into; a booking agency? A. Yes.

Q. Who was that? A. Vic Schroeder Agency.

Q. That is at Omaha, Nebraska? A. Yes.

Q. And that agent booked that engagement for you? A. Yes.

Q. Did you ever play an engagement at the Crystal Ballroom before January 18, 1942? A. Yes, sir.

Q. You mentioned that you assembled your orchestra back in 1934? A. '36.

Q. '36. I beg your pardon. What can you tell us as to who selected the sidemen at that time?

A. When I started the orchestra I bought it from a fellow. He come in a bus and I got it. I didn't even know their names.

Q. You subsequently became acquainted with their names? A. That is right.

Mr. Cohen: Now, if the court please, I would like to object to any testimony which has to do with orchestras [fol. 260] other than those in issue in this case. An orchestra is more than just a leader. It is an aggregation of musicians. I think counsel should have listed those who were on this particular engagement, and then directed questions to that particular engagement; otherwise I believe this evidence attempted to be elicited is immaterial.

The Court: Overruled. There are a good many ways to admit proof of matters. Some times it is necessary to go round-about. Overruled. (Defendant excepts).

Q. Now from time to time after you got that orchestra, as you testified, did you have some replacements?

A. Yes, a good many.

Q. Who made those replacements?

A. I made the selection.

Q. Of the men who took the places? A. Yes.

Q. What can you tell the court as to whether the sidemen who played the engagement of January 18th 1942, were selected by you some time prior to that date?

A. They were.

Q. What can you tell the court as to whether some of your men had been selected prior to June 25, 1941, the date of the contract. A. They were.

[fol. 261] [A. They were.]

Q. Now when you hired or selected the sidemen for your organization did you talk to them about their pay?

A. Yes, sir.

Q. Tell them how much you would pay them?

A. Yes, sir.

Q. You inquired about their experience?

A. You would if you did not know him personally, but I knew most of them personally.

Q. Did you ever audition him? A. No.

Q. Have him play with the band?

A. If they cannot cut it they get out.

Q. Will you explain that to the court?

A. If they do not play well enough you give them notice and find a replacement.

Q. You did that? A. Yes.

Q. Who determined the number of men in your orchestra? A. I did.

Q. That was true in 1941 and 1942? A. Yes.

Q. Now you told about a man if he could not cut it you would give him notice. Were you the man that told him to leave the orchestra?

[fol. 262] A. That is right.

Q. In other words, you would discharge him?

A. That is right.

Q. Now what can you tell the court as to whether or not during the years your orchestra has been in existence you endeavored to have it play a distinctive style of music?

A. Yes, we did. At the time we were playing these contracts it was a slide style of music.

Q. Some name for that, is there not? A. Slide music.

Q. That was true during 1942, all of 1942?

A. No, that was during 1941.

Q. 1941? A. 1942, in January, it was.

Q. Now in order to produce the slide music did you have a musical library?

A. Yes, all except the arrangement.

Q. Who paid for those? A. I did.

Q. And did you have somebody to prepare the arrangement for you? A. Yes.

Q. And did you, when you had replacements as you testified, did you pick the men that you thought would produce that music?

[fol. 263] A. Yes, sir.

Q. You determined your instrumentation with that in mind, didn't you? A. Yes.

Q. That was true at the time of this engagement at the Crystal Ballroom? A. Yes.

Q. Also later on in February at the Geer Ballroom too?

A. I don't know without looking it up. I presume we did with Larry or Mr. Geer, but the slide music went out, the three trombones all at once.

Q. You got some replacements for those three trombones?

A. That is true. That was the end of the slide music.

Q. Did your orchestra have a theme song? In 1942?

A. Yes.

Q. Who selected that?

A. I would not say I selected it. I didn't use it any more. That was rather beside the point. I would select it, enough to count.

Q. There have been times when you had a theme song?

A. Now, yes.

Q. What can you tell the court as to whether you rehearsed the orchestra in advance of this engagement in the

Crystal Ballroom in January 1942; did you have some rehearsal?

[fol. 264] A. Yes.

Q. At the rehearsal did you try to work out chords and harmonies with the musicians?

A. That is on the arrangement. You just play the arrangement.

Q. You practiced? A. Yes.

Q. You make suggestions at times? A. Yes.

Q. Did you have any feature members of your organization during 1942? A. Yes.

Q. Did you have any vocalists?

A. No, not just single.

Q. Did you have several? A. Yes.

Q. You selected those?

A. They were just members of the orchestra.

Q. Just members who sing at times during the orchestra performance? A. Yes.

Q. Now did your orchestra use any music racks during the playing of its engagements in 1942?

A. Yes.

Q. Who furnished those?

A. I bought them.

[fol. 265] Q. Going back to the musical arrangement for a moment, did you pay for those? A. Yes.

Q. They became your personal property?

A. That is right.

Q. Did your orchestra use a public address system during the year 1942? A. Yes.

Q. Who furnished that? A. I did.

Q. What can you tell the court as to whether you had any special lighting fixtures that were used in connection with the orchestra performance during 1942?

A. Very little. Oh, we did carry spots and floods.

Q. You set those up? A. Yes.

Q. Who owned those? A. I did.

Q. Did the sidemen wear any special attire during the performances of the orchestra engagements during 1942?

A. Yes; had uniforms.

Q. Who selected those? A. I did.

Q. Now what can you tell the court as to how your orchestra traveled to these various engagements during 1942?

[fol. 266] A. Sleeper trailer.

Q. Sleeper trailer? A. Yes; semi.

Q. Semi-trailer? A. Yes.

Q. Who owned that? A. I did.

Q. Registered in your name?

A. That is right.

Q. You mentioned a sleeper trailer, how many persons could sleep in that vehicle?

A. We were just sleeping ten.

Q. In some kind of bunks on the inside, or berths rather?

A. Berths.

Q. You used that bus to travel to the engagements in the Crystal Ballroom? A. Yes.

Q. Also any engagements you may have had at the Geer Ballroom? A. Yes.

Q. During the year 1942? A. Yes.

Q. Mr. Moorhead, I will hand you what has been marked Exhibit B-1, and ask you to examine that document and ask you if the entries there in ink in longhand are in [fol. 267] your writing?

A. Yes, this is my writing.

Q. Is that the document entitled weekly business report?

A. Yes, sir.

Q. And on the reverse side of the document it is headed by "Itemized operating expense"?

A. Yes, that is right.

Q. I note on the front of the exhibit some columns, and in the extreme lefthand one is entitled "Days Played". There is a list there in pen and ink, that is from January 17th to January 23rd; is that right?

A. That is right.

Q. And that is for the week ending January 23rd, 1942?

A. Yes.

Q. And do you have under the date of January 18th, the word Dubuque? A. Yes.

Q. Is that in your handwriting? A. It is.

Q. You show in the column under gross receipts $120.40?

A. Yes.

Q. Is that what you received from the engagement of January 18th at the Crystal Ballroom?

A. Yes.

Q. That is included with a number of receipts from other [fol. 268] engagements, is that correct?

A. Yes, sir.

Q. And the total for that week is $677.44, is that right?

A. That is right.

Q. And that is entered below under the general heading of "Cash Account" showing the total income for the week as $667.44 is that right? A. Yes.

Q. That is in your handwriting, the figures?

A. Yes.

Q. Then you have listed operating expense $574.91, is that right?

A. Yes.

Q. And the balance is noted in the statement Balance profit or loss, $101.53, is that right?

A. Yes.

Q. Who received that? A. I did.

Q. Turning to the reverse side of the exhibit do you find a few items in your handwriting, your operating expense for that week in which January 18th, 1942, occurred?

A. Yes.

Q. First you have A.F.M., checks $26.80?

A. Yes.

Q. Now you have a list of salaries paid; is that list all [fol. 269] the amounts in your handwriting?

A. Yes.

Q. And that is a total of $385.81 salaries?

A. Yes.

Q. Who determined those amounts, Mr. Moorhead?

A. Payable to the musicians?

Q. Yes. A. I did.

Q. That represents what you had agreed to pay them for that week?

A. Well, looking at these names there, they did not all get $12.00.

Q. At any rate the amounts you set out here is the amount you determined to pay them; is that right?

A. That is right.

Q. Then you have an item in your handwriting opposite the printed words, gasoline only, $30.80?

A. Yes.

Q. Oil $4.90?

A. Yes.

Q. What was that gasoline and oil for, if you know?
A. Driving the bus.
Q. During that week?
A. Yes.
Q. Then you have some other items, bulbs, .98 cents, in
[fol. 270] your handwriting? A. Yes.
Q. And you have a Lewis Kozisek, $15.00?
A. Driver.
Q. Driver of your bus? A. Yes.
Q. Is that the amount you had agreed to pay?
A. Yes.
Q. For his services during this week?
A. Yes.
Q. The booking office, Vic Schroeder Agency $101.53?
A. Yes.
Q. The amount in your handwriting?
A. Yes.
Q. In the other column on the righthand side there are various other expenses in your handwriting?
A. Yes.
Q. You have one item I notice here [deoderant]?
A. Twenty-five cents.
Q. Telephone $3.70? A. Yes.
Q. P. A. Sitz rubbers $4.75?
A. Yes.
Q. One item of special arrangements, Bob Roper, $10.00. Is that the sum of money you paid him for the arrange-
[fol. 271] ments? A. Yes.
Q. And the words Bob Roper $10.00 is in your handwriting? A. Yes.
Q. All of these expenses that appear in your handwriting total $574.91, which was carried forward to the first page of the report; is that correct?
A. That is correct.
Q. Did you keep such a record as appears on Exhibit B-1 for each week during 1942?
A. Yes.
Q. And had you kept such a weekly report during prior years? A. Yes.
Q. That is during '41 and '39? A. Yes.
Q. Showing items of income and various items of expense?
A. These reports, however, stopped November 4, 1942.

Mr. Roberts: I now offer in evidence plaintiffs' Exhibit B-1.

Mr. Padway: We have no objection.

Mr. Cohen: No objection.

The Court: It is admitted.

Exhibit #1
11/12/44
HEB

VSA #263, $97.40

VSA
VIC SCHOOLER AGENCY

WEEKLY BUSINESS REPORT

Week Ending Jan 23, 1942 Moore, L. Band

Dates Played	SPOTS PLAYED		Gross Receipts	Less AFM	Net Receipts	Less Mileage	Net Balance	Fees Payable
Jan 17	Des Moines	Iowa	100.00	7.35				
18	Dubuque	→	102.40	4.90			97.50	
19	Open							
20	Dantes	So Dak.	146.50					
21	Des Moines	Iowa	85.00	7.35				
22	St. Joseph	Mo.	85.00	7.20				
23	Elkton	S. D.	157.54					
								97.90
			676.94	26.80				101.53

FILED
DEC 1 3 1944
N. F. Reed
CLERK

CASH ACCOUNT

Gross Engagement Receipts	$
Plus Union Returns Received	$
Plus Partnership Paid In	$
Total Income This Week	$ 676.44
Less: Operating Expenses This Week	$ 514.91
Balance — Profit - Loss	$ 161.53
Less: Paid to Partners	$
Balance (Long) (Short)	$
Less: Payments Made	$
Balance (Long) (Short)	$
Less: Purchases	$
Balance (Long) (Short)	$
From Last Week—Balance (Long) (Short)	$
To Date—Balance (Long) (Short)	$

PAID TO PARTNERS

	$
	$
	$
	$
	$
	$
	$
TOTAL	$

PAYMENTS MADE

	$
	$
	$
	$
	$
	$
	$
TOTAL	$

PURCHASES

	$
	$
	$
	$
	$
	$
	$
TOTAL	$

Plaintiffs' Exhibit B-1.
Filed in U. S. District Court December 13, 1944.

171

CASH ACCOUNT

Gross Engagement Receipts	$
Plus Union Returns Received	$
Plus Partnership Paid In	$
Total Income This Week	$ 676.44
Less: Operating Expenses This Week	$ 514.91
Balance — Profit - Loss	$ 161.53
Less: Paid to Partners	$
Balance (Long) (Short)	$
Less: Payments Made	$
Balance (Long) (Short)	$
Less: Purchases	$
Balance (Long) (Short)	$
From Last Week—Balance (Long) (Short)	$
To Date—Balance (Long) (Short)	$

PAID TO PARTNERS

	$
	$
	$
	$
	$
	$
TOTAL	$

PAYMENTS MADE

	$
	$
	$
	$
TOTAL	$

PURCHASES

	$
	$
	$
	$
TOTAL	$

Plaintiffs' Exhibit B-1.
Filed in U. S. District Court, December 13, 1944.

171

ITEMIZED OPERATING EXPENSES

AFM TAX PAID	$ 26.80
SALARIES PAID	
Eddie Rasmussen	$ 12.00
Tony Moreno	$ 54.11
Kendall Hall	$ 54.11
Harry Lorenzen	$ 35.00
Tiny Wehland	$ 80.00
Porky Jungers	$ 40.00
Bob Roper	$ 35.00
Harry Campbell	$ 35.16
Lee Stryker	$ 30.00
Bill Wollermade	$ 20.00
Art Koterba	$ 6.43
Stand By Tonia Del Monaco	$ 14.00 385.81
Gasoline only	$ 30.80
Oil only	$ 4.90
Tractor Repairs only	$
Other Transportation Expenses:	
Bridge Tolls	$
Parking or Storage	$
Trailer Repairs	$
Fuel for Stove	$
Washing	$
Greasing	$
Tire and Tube Repairs	$
Taxi	$
Plane, Train or Bus	$
Cleaning Bus	$
Cleaning Sleeper Furnishings	$

Total Forwarded from Left Column	$ 550.76
Photos, Plates, Pictures, etc.	$
Good Will Expense	
Tromar Jan 12	$ 2.75
Dante " 20	$ 6.25
ELKTon " 23	$ .75
5.75	$
	$
	$
	$
Advertising (Not Ballroom News)	$
Special Arrangements (Music) Bob Roper	$ 10.00
Sub-Booker (Not VSA)	$
Stocks and Sheet Music, etc. (Music)	$
PA Set Repairs only	$ 4.45
Soc. Security and Excise Unemploym't Taxes	$
Other Taxes, Licenses, Compensation	$
Insurance for Business only	$
Interest Paid	$
Miscellaneous Expenses	
Telephone and Telegraph	$ 3.70
Hotel	$
Food Away from Home	$
Uniform—Cleaning and Repairs	$
Uniform—Laundry and Repairs	$
Instrument Repairs	$
Reeds, Oil, Strings, etc., for Instrument	$
Tips (Business Services)	$
Legal Services	$

Plaintiffs' Exhibit B-1.
Filed in U. S. District Court December 13,

Cleaning Bus	$	Legal Services	$
Cleaning Sleeper Furnishings	$	Sales Taxes on Non-Expense Items	$
Replacing Sleeper Furnishings	$	War Tax on Non-Expense Items	$
Lewis Kozisek	$ 20 00	Bus Deodorant	$ 25
Plugs + Bulbs (Bus	$ 92		$
Vic Schroeder Agency, Booking Fees	$ 101.53		$
Advertising (Ballroom News)	$	TOTAL PAID OUT 3,128	$ 574 91
Total Forwarded to Right Column	$ ~~101 53~~ 550 76		

Cleaning Bus	$	Legal Services	$
Cleaning Sleeper Furnishings	$	Sales Taxes on Non-Expense Items	$
Replacing Sleeper Furnishings	$	War Tax on Non-Expense Items	$
Lewis Kozisek	$ 20.00	Bus Deodorant	$ .25
Plugs & Bulbs (Bus	$ .92		$
Vic Schroeder Agency, Booking Fees	$ 101.53		$
Advertising (Ballroom News)	$	TOTAL PAID OUT 3,178	$ 574.91
Total Forwarded to Right Column	$ ~~101.53~~ 550.76		

1944.

173

[fol. 274] Q. I hand you, Mr. Moorehead, what the reporter has marked Exhibits B-2, B-3, B-4, B-5, and ask you to examine them, and ask you if Exhibit B-2 is a contract dated December 19, 1941, for an engagement by your orchestra at the Cobblestone Ballroom, Storm Lake, Iowa, January 3, 1942; is that right?

A. Yes, that is right.

Q. Who operates the Cobblestone Ballroom?

A. Larry Geer.

Q. Is Exhibit B-3 another contract dated September 16, 1942 for an engagement of your orchestra on October 13, 1942, at the Cobblestone Ballroom? A. Yes, it is.

Q. Is Exhibit B-4 another contract dated March 25, 1942 for an engagement by your orchestra at the Cobblestone Ballroom on Tuesday, April 3, 1942? A. Yes.

Q. And Exhibit B-5 another contract dated January 13, 1942, for an engagement at the Laramar Ballroom, Fort Dodge, Iowa, January 28, 1942? A. Yes.

Q. Who operated the Laramar Ballroom at that time, if you know? A. Larry Geer.

Q. All of these contracts were booked through your booking agency, Vic Schroeder Booking Agency, at Omaha, Nebraska? A. Yes.

[fol. 275] Mr. Roberts: The plaintiffs offer in evidence Exhibits B-2, B-3, B-4 and B-5.

Mr. Cohen: I object to the admissibility of these exhibits on the ground that they do not relate to any of the engagements which are at issue in either of the cases.

Mr. Roberts: I beg your pardon. I was handed the wrong bunch of exhibits. We will withdraw the offer.

Q. I will hand you, Mr. Moorhead, Exhibits marked B-6 to B-24, both inclusive, and ask you if all of those exhibits are contracts for engagements by your orchestra at Geer Ballrooms? A. Yes.

Q. And the date shown on each of those exhibits is the date of the contract; is that correct?

A. Yes; those are the contracts.

Q. They are all dated? A. Yes.

Q. And each one of them has the date of the engagement; is that right?

A. As far as I know. It should be.

Q. As far as you know? A. Yes.

Q.. And they are all booked by your booking agency, Vic Schroder, Omaha?

A. Well, I can't say they were all played. Some times [fol. 276] we changed the dates. They should be correct.

Mr. Roberts: The plaintiffs offer in evidence Exhibits B-6 to B-24 both inclusive.

Mr. Cohen: I have no objection.

Mr. Padway: I have no objection.

The Court: Admitted.

booking agency,

ed. Some times
ould be correct.

vidence Exhibits

Exhibit B-6
12/17/44 HEB

VSA

VIC SCHROEDER AGENCY

Omaha, Nebr.

FILED
DEC 1 1944
CLERK

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 13 day of January 1942, between the undersigned employer (hereinafter called the employer and Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Larsen Ballroom Fort Dodge, Iowa.	Sun. February 27, 1944	From 8:30 P.M. - 12:15 A.M.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

on or before conclusion of above engagement.
To be paid
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: Mr. Larry Geer — Accepted by Employer: Larry Geer

Street Address: P. O. Box No. 5 — Accepted (Orchestra Leader): Vic Schroeder

City or State: Fort Dodge, Iowa. — By (Representatives of Employees):

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1288, Omaha, Nebraska.

No. 7132 A

Plaintiffs' Exhibit B-6.
Filed in U. S. District Court December 13, 1944.
177

#463	Michael Moreno	503-09-1257	$ 8.00
#463	Wm. Woltemade	505-18-5236	$ 6.00
#137	LeRoy Stryker	505-18-2248	$ 6.00
#70	Harry Lorenzen	505-14-5524	$ 6.00
#70	Art Koterba	508-16-8072	$ 6.00
#70	Leo Rex Wheland	506-09-5804	$ 6.00
#255	Wendall Hall	506-10-3312	$ 6.00
#230	Merlin Wm. Jungers	484-09-4235	$ 6.00
#443	Sheldon Fonda	072-16-0778	$ 6.00
Transportation, Taxes, Comm. & Miscl.			$ 44.00
		TOTAL	$100.00

Plaintiffs' Exhibit B-8.
Filed in U. S. District Court December 13, 1944.
187

#463	Michael Moreno
#404	Robt. Roper
#70	Arthur Roterbe
#70	Harry Lorenzen
#70	Wendall Hall
#70	Neil Whitesides
#450	Russell Sapp
#70	Leo Rex (Max) Whe
#239	Merlin Jungers

TRANSPORTATION, TAXES, MISCL.

Plaintiffs' Exhibit B-6.
Filed in U. S. District Court December 13, 1944.

	503-59-1257	$ 8.00
	507-14-6281	$ 6.00
	508-16-9072	$ 6.00
	505-14-5824	$ 6.00
	506-10-3312	$ 6.00
s	507-03-5426	$ 6.00
	479-13-1007	$ 6.00
Wheland	506-09-5804	$ 6.00
	484-09-4235	$ 6.00
L. & COM.		$44.00
	T O T A L	$100.00

EXHIBIT B-7
HEB
12/12/44

VSA

VIC SCHROEDER AGENCY

Omaha, Nebr.

FILED
DEC 13 1944
N. F. Reed
CLERK

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 16 day of February, 1942, between the undersigned employer (hereinafter called the employer and Nine (9) Men. musicians (hereinafter called employees) represented by the undersigned representative. (including Leader)

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions:

Plaintiffs' Exhibit B-7.
Filed in U. S. District Court December 13, 1944.

181

Place of Employment	Date(s) of Employment	Hours of Employment
Larsmer Ballroom Ft. Dodge, Iowa [illegible]	Sat. March 21, 1942	From 9:00 PM. - 12:00 A.M.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Mr. Larry Geer

Accepted by Employer

Street Address P. O. Box No. 5

Accepted (Orchestra Leader)

City or State Fort Dodge, Iowa.

By Vic Schroeder
(Representatives of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1299, Omaha, Nebraska.

No. 7333 A

#463	Michael Moreno	603-09-1257	$ 6.50
#463	Wm. Woltemade	505-18-8236	$ 5.00
#137	LeRoy Stryker	505-18-2248	$ 5.00
#70	Harry Lorenzen	505-14-5524	$ 5.00
#70	Art Koterba	508-16-8072	$ 5.00
#255	Wendall Hall	506-10-3312	$ 5.00
#70	Leo Rex Wheland	506-09-5804	$ 5.00
#230	Merlin Wm. Jungers	484-09-4235	$ 5.00
#443	Sheldon Fonda	072-16-0778	$ 5.00
Transportation, Taxes, Comm. & Misc.			$ 53.50
		TOTAL	$100.00

Plaintiffs' Exhibit B-7.
Filed in U. S. District Court December 13, 1944.

EXHIBIT

B HEB 12/12/44

FILED
DEC 13 1944
J. Reed
CLERK

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra | Gene Pieper and his Orchestra | Paul Moorhead and his Orchestra | Leo Pieper and his Orchestra | Skippy Anderson and his Orchestra | Ralph Slade and his Orchestra | Larry Herman and his Orchestra | Hank Winder and his Orchestra | Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 14 day of February 194 2, between the undersigned employer (hereinafter called the employer and by the undersigned representative. Nine (9) Men (including Leader) musicians (hereinafter called employees) represented

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

[redacted] according to the following terms and conditions:

Plaintiffs' Exhibit B-8.
Filed in U. S. District Court December 13, 1944.

Place of Employment	Date(s) of Employment	Hours of Employment
Larmar Ballroom Fort Dodge, Iowa.	Sun. March 22, 1942	From 8:40 PM. - 12:15 AM.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation; riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Mr. Larry Geer — Accepted by Employer

Street Address P. O. Box No. 5 — Accepted (Orchestra Leader)

City or State Fort Dodge, Iowa. — By Vic Schroeder (Representative of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1299, Omaha, Nebraska.

No. 7334 A

185

Plaintiffs' Exhibit B-10.
Filed in U. S. District Court December 13, 1944.

#463	Michael Moreno	503-09-1257	$ 7.00
#463	Wm. Woltemade	505-18-5236	$ 5.00
#137	LeRoy Stryker	505-18-2248	$ 5.00
#70	Harry Lorenzen	505-14-5524	$ 5.00
#70	Art Koterba	508-16-8072	$ 5.00
#255	Wendell Hall	506-10-3312	$ 5.00
#70	Leo Rex Wheland	506-09-5804	$ 5.00
#230	Merlin Wm. Jungers	484-09-4235	$ 5.00
#443	Sheldon Fonda	072-16-0778	$ 5.00
Trans. Taxes. Comm. & Miscl.			$ 53.00
		Total	$100.00

195

Plaintiffs' Exhibit B-9.
Filed in U. S. District Court December 13, 1944.

B-9
12/12/44
HEP

FILED
DEC 13 1944
CLERK

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 25 day of March 1942 between the undersigned employer (hereinafter called the employer and Nine (9) Men. musicians (hereinafter called employees) represented by the undersigned representative. (including Leader)

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Cobblestone Ballroom Storm Lake, Iowa.	Sat. April 18, 1942	From 9:00 PM. - 12:55 AM.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local in whose jurisdiction the musicians are playing shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

#463	Michael Moreno
#463	Wm. Woltemade
#137	LeRoy Stryker
#70	Harry Lorenzen
#70	Art Koterba
#255	Wendall Hall
#70	Leo Rex Wheland
#230	Merlin W. Jungers
#443	Sheldon Fonda

Trans. Taxes, Comm. & Misc.

Plaintiffs' Exhibit B-9.
Filed in U. S. District Court December 13, 1944.

503-09-1257	$ 6550
505-18-5236	$ 5.00
505-16-2248	$ 5.00
505-14-5524	$ 5.00
508-16-8072	$ 5.00
506-10-3312	$ 5.00
506-09-5804	$ 5.00
484-09-4235	$ 5.00
072-16-0778	$ 5.00
	$ 53.50
T O T A L	$100.00

191

Ex. B-10
11/11/44
HF B

VSA

VIC SCHROEDER AGENCY

FILED
DEC 1 3 1944
T. Reed
CLERK

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 24 day of April, 1942, between the undersigned employer (hereinafter called the employer and Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Laramar Ballroom Fort Dodge, Iowa.	Sat. May 2nd, 1942	From 9:00 PM. - 12:00 PM.

PRICE AGREED UPON, IS $ 100.00 guaranteed.
(Terms and amount)

on or before conclusion of above engagement.

To be paid
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Mr. Larry Geer
Name of Employer

P. O. Box No. 5
Street Address

Fort Dodge, Iowa.
City or State

Accepted by Employer

Accepted
(Orchestra Leader)

By Barney Parsons
(Representative of Employees)

RETURN ALL COPIES SIGNED TO Vic Schroeder Agency, Box 1298, Omaha, Nebraska

Plaintiffs' Exhibit B-10.
Filed in U. S. District Court December 13, 1944.

193

#463	Michael Moreno	503-09-1257	$ 7.00
#463	Wm. Woltemade	505-18-5236	$ 5.00
#137	LeRoy Stryker	505-18-2248	$ 5.00
#70	Harry Lorenzen	505-14-5524	$ 5.00
#70	Art Koterba	508-16-8072	$ 5.00
#255	Wendall Hall	506-10-3312	$ 5.00
#70	Leo Rex Wheland	506-09-5804	$ 5.00
#230	Merlin Wm. Jungers	484-09-4235	$ 5.00
#443	Sheldon Fonda	072-16-0778	$ 5.00
Trans. Taxes. Comm. & Miscl.			$ 53.00
		Total	$100.00

Plaintiffs' Exhibit B-12.
Filed in U. S. District Court December 13, 1944.

203

Ex. B-11
12/15/44
H.E.B

FILED
DEC 13 1944

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra | Gene Pieper and his Orchestra | Paul Moorhead and his Orchestra | Leo Pieper and his Orchestra | Skippy Anderson and his Orchestra | Ralph Slade and his Orchestra | Larry Herman and his Orchestra | Hank Winter and his Orchestra | Bobby Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 24 day of April, 194 4, between the undersigned employer (hereinafter called the employer) and by the undersigned representative Nina (P.) Moore (including Leader) musicians (hereinafter called employees) represented

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD, according to the following terms and conditions

Place of Employment	Date(s) of Employment	Hours of Employment
Cobblestone Ballroom Storm Lake, Iowa.	Sat. May 9th, 1942	From 9:00 P.M. - 1:00 A.M.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer, the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to prevent detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employer. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer so long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Mr. Larry Coor

Street Address P. O. Box No. 5

City or State Fort Dodge, Iowa.

Accepted by Employer

Accepted (Orchestra Leader)

By Bennie Parsons (Representatives of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1200, Omaha, Nebraska

No. 7965 - A

Plaintiffs' Exhibit B-11.
Filed in U. S. District Court December 13, 1944.
197

Plaintiffs' Exhibit B-11.
Filed in U. S. District Court December 13, 1944.

#463	Michael Moreno	503-09-1257	$ 6.50
#463	Wm. Woltemade	505-18-5236	$ 5.00
#137	LeRoy Stryker	505-18-2248	$ 5.00
#70	Harry Lorenzen	505-14-5524	$ 5.00
#70	Art Koterba	508-16-8072	$ 5.00
#255	Wendall Hall	506-10-3312	$ 5.00
#70	Leo Rex Wheland	506-09-5804	$ 5.00
#230	Merlin Wm. Jungers	484-09-4235	$ 5.00
#443	Sheldon Fonda	072-16-0778	$ 5.00
Trans. Taxes. Comm. & Miscl.			$ 53.50
		Total	$100.00

FILED

DEC 13 1994

CLERK

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra | Gene Pieper and his Orchestra | Paul Moorhead and his Orchestra | Leo Pieper and his Orchestra | Skippy Anderson and his Orchestra | Ralph Slade and his Orchestra | Larry Herman and his Orchestra | Hank Winder and his Orchestra | Eddy Duchin and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 24 day of April, 194 2, between the undersigned employer (hereinafter called the employer and Nine (9) Men. musicians (hereinafter called employees) represented by the undersigned representative. (including Leader)

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of PAUL MOORHEAD. according to the following terms and conditions

Place of Employment	Date(s) of Employment
Laremar Ballroom Fort Dodge, Iowa.	Sat. May 16th, 1942

PRICE AGREED UPON IS $ 100.00 guaranteed.

(Terms a

To be paid on or before conclusion of above engag

(Specify when payments are to

The employer shall at all times have complete control of the services which the employee behalf of the employer the Leader will distribute the amount received from the employer to side of this contract, or in plate thereof on separate memorandum supplied to the employer at and take and turn over to the employer receipts therefor from each employee, including himself portation, which will be reported by the Leader to the employer. The employer hereby autho by illness, absence, or for any other reason does not perform any or all of the services provide perform, is subject to proven detention by sickness, accidents or accident t ns of transp legitimate conditions beyond the control of the employed. The employer agrees that the Busi diction the musicians are playing, shall have access to the premises in which the musicians per ferring with the musicians. The musicians performing services under this contract must be me in this contract shall ever be so construed as to interfere with any obligation which they may

It is agreed that all the rules, laws and regulations of the American Federation of Music whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the

The employer represents that there does not exist against him, in favor of any employee of any kind arising out of musical services rendered for any such employer. It is agreed that will be required to perform any provisions of this contract or to render any services for said e in whole or in part. The employer in signing this contract himself, or having same signed by a r and hereby assumes liability for the amount stated herein.

Name of Employer Mr. Larry Coor

Accepted by

Street Address P. O. Box No. 5

Accepted

City or State Fort Dodge, Iowa.

By

RETURN ALL COPIES SIGNED TO Vic Schroeder Agency, Box 1290, Omaha, Nebraska

Plaintiffs' Exhibit B-12.
Filed in U. S. District Court December 13, 1944.

201

	Hours of Employment
2	From 9:00 P.M. - 12:00 P.M.

ns and amount)

gagement.

to be made)

loyees will render under the specifications of this contract (m
to the employees, including himself, as indicated on the opposite
or at or before the commencement of the employment hereunder
mself. The amount paid to the Leader includes the cost of trans-
authorizes the Leader on his behalf to replace any employee wh
rovided for under this contract. The agreement of the employees to
ansportation, riots, strikes, epidemics, acts of God, or any other
Business Representative of the Musicians' Local in whose juris-
e perform (except in private residences) for the purpose of c
e members of the American Federation of Musicians and nothing
may owe to the American Federation of Musicians.

Musicians, and all the rules, laws and regulations of the Local in
the Federation, are made part of this contract.

loyee-member of the American Federation of Musicians any claim
that no employee-member of the American Federation of Musicians
said employer as long as any such claim is unsatisfied or unpaid
y a representative, acknowledges his (her or their) authority to d

by Employer.

(Orchestra Leader)

Representative of Employees)

sana

No. 7968 A

Ex B-B
11/12/44 HEB

VSA

VIC SCHROEDER AGENCY

VIC SCHROEDER AGENCY

Omaha, Nebr.

FILED
DEC 1 1944

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy [illegible] Orchestra

THIS CONTRACT for the personal services of musicians, made this 22 day of May 194[illegible], between the undersigned employer (hereinafter called the employer and [illegible] Men, musicians (hereinafter called employees) represented by the undersigned representative (including Leader)

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD, according to the following terms and conditions

Place of Employment	Date(s) of Employment	Hours of Employment
Alhambra Ballroom at Twin Lakes (Near) Rockwell City Iowa).	Thur. May 28th, 1942	From 8:55 P.M. - 12:25 A.M.

PRICE AGREED UPON IS $ 90.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: Mr. Larry [illegible]

Street Address: P. O. Box No. 5..

City or State: Fort Dodge, Iowa.

Accepted by Employer

Accepted. (Orchestra Leader)

By: Vic Schroeder (Representative of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1299, Omaha, Nebraska

No. 8113 A

Plaintiffs' Exhibit B-13.
Filed in U. S. District Court December 13, 1944.

205

#463	Michael Moreno
#463	Wm. Woltemade
#137	LeRoy Stryker
#70	Harry Lorenzen
#70	Art Koterba
#255	Wendall Hall
#70	Lem Rex Wheland
#280	Merlin Jungers
#443	Sheldon Fonda

Ex B-14

FILED

DEC 1 3 1944

VSA

THE SCHROEDER AGENCY

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra | Gene Pieper and his Orchestra | Paul Moorhead and his Orchestra | Lea Pieper and his Orchestra | Skippy Anderson and his Orchestra | Ralph Slade and his Orchestra | Larry Herman and his Orchestra | Hank Wilder and his Orchestra | Eddy Duchin and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 24 day of April 194 2, between the undersigned employer (hereinafter called the employer) and by the undersigned representative.

Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions

Place of Employment	Date(s) of Employment	Hours of Employment
Laramar Ballroom Fort Dodge, Iowa.	Sun. May 21st, 1942	From 8:45 PM. - 12:15 AM.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer, as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: Mr. Larry Geer — Accepted by Employer

Street Address: P. O. Box No. 5 — Accepted (Orchestra Leader)

City or State: Fort Dodge, Iowa. — By: Bonnie Parsons (Representative of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1299, Omaha, Nebraska

77

No. 7976 A

Plaintiffs' Exhibit B-14.
Filed in U. S. District Court December 13, 1944.

#255	Wendall Hall	506-10-3312	$ 6.50
#663	Michael Moreno	503-09-1257	$ 5.00
#75	Bob Adamson	485-01-1411	$ 5.00
#443	Sheldon Fonda	072-16-0778	$ 5.00
#137	LeRoy Stryker	505-18-2248	$ 5.00
#463	Wm. Woltemade	505-18-5236	$ 5.00
#463	Don Brehm	506-05-9945	$ 5.00
#70	Horace J. Ort	507-10-3887	$ 5.00
#450	J. R. Sapp	479-18-1007	$ 5.00
		Trans.	$ 21.00
		Comm.	$ 7.50
			$ 75.00

Plaintiffs' Exhibit B-16.
Filed in U. S. District Court December 13, 1944.

219

Plaintiffs' Exhibit B-14.
Filed in U. S. District Court December 13, 1944.

211

#463	Michael Moreno	503-09-1257	$ 8.00
#463	Wm. Woltemade	505-18-5236	$ 6.00
#137	LeRoy Stryker	505-18-2248	$ 6.00
#70	Harry Lorenzen	505-14-5524	$ 6.00
#70	Art Koterba	508-16-8072	$ 6.00
#256	Wendall Hall	506-10-3312	$ 6.00
#70	Leo Rex Wheland	506-09-5804	$ 6.00
#330	Merlin Wm. Jungers	484-09-4235	$ 6.00
#443	Sheldon Fonda	072-16-0778	$ 6.00
Trans. Taxes. Comm. & Miscl.			$ 44.00
		Total	$ 100.00

Ex B-15
12/12/44
HEB

VSA

VIC SCHROEDER AGENCY

Omaha, Nebr.

FILED
DEC 13 1944
T. Reed

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winders and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 26 day of May 1942 between the undersigned employer (hereinafter called the employer and Nine (9) Men musicians (hereinafter called employees) represented by the undersigned representative (including Leader)

... and the employees severally through their

WITNESSETH. That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD

.....according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Cobblestone Ballroom Storm Lake, Iowa.	Tue. June 2nd, 1942	From 9:00 PM. - 1:00 AM.

PRICE AGREED UPON IS : 70.00 guaranteed, plus the privilege that the attraction may take
(Terms and amount)

60% of gross receipts. (Gross earnings of the band not to exceed $100.00).

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer so long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Mr. Larry Geer.

Street Address P. O. Box No. 8

City or State Fort Dodge, Iowa.

Accepted by Employer

Accepted Larry
(Orchestra Leader)

By Bonnie Parsons.
(Representatives of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1209, Omaha, Nebraska.

No 8153 A

Plaintiffs' Exhibit B-15.
Filed in U. S. District Court December 13, 1944.

213

Plaintiffs' Exhibit B-15.
Filed in U. S. District Court December 13, 1944.

215

#255	Wendall Hall	506-10-3312	$ 6.50
#463	Michael Moreno	503-09-1257	$ 5.00
#75	Bob Adamson	485-01-1411	$ 5.00
#443	Sheldon Fonda	072-16-0778-	$ 5.00
#137	LeRoy Stryker	505-18-2248	$ 5.00
#463	Wm. Woltemade	505018-5236	$ 5.00
#70	Horace J. Ort	507-10-3887	$ 5.00
#463	Don Brehm	506-05-9943	$ 5.00
#850	J. R. Sapp	479-18-1007	$ 5.00
		Trans.	$ 6.50
		Comm.	$ 7.00
		Misc.	$ 10.00
			$ 70.00

Ex. B 16
12/12/44 HEB

VSA

FILED
DEC 13 1944
N. F. Reed
CLERK

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 26 day of May, 1943, between the undersigned employer (hereinafter called the employer) and Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Cobblestone Ballroom Storm Lake, Iowa.	Tue. June 30th, 1942	From 9:00 PM. - 1:00 AM.

PRICE AGREED UPON IS: 75.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: Mr. Larry Geer

Accepted by Employer: [redacted]

Street Address: P. O. Box No. 5

Accepted: [redacted] (Orchestra Leader)

City or State: Fort Dodge, Iowa.

By: Bonnie Parsons (Representatives of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1290, Omaha, Nebraska

No. 8154 A

Plaintiffs' Exhibit B-16.
Filed In U. S. District Court December 13, 1944.

217

Ex B-17
12/12/44 HEB

VSA

VIC SCHROEDER AGENCY

Omaha, Nebr.

FILED
DEC 1 1944
CLERK

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 25 day of June 1942 between the undersigned employer (hereinafter called the employer and Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Exposition Park Fort Dodge, Iowa.	Sat. July 11th, 1942	From 9:00 PM. - 12)00 PM.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

on or before conclusion of above engagement.

To be paid
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opp site side of this contract or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Mr. Larry Ocas

Street Address P. O. Box No. 5

City or State Fort Dodge, Iowa.

Accepted by Employer

Accepted
(Orchestra Leader)

By Vic Schroeder
(Representatives of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1290, Omaha, Nebraska

77

No. 8352 A

Plaintiffs' Exhibit B-17.
Filed in U. S. District Court December 13, 1944.

221

#255	Wendell Hall	506-10-3312	$ 6.50
#463	Michael Moreno	503-09-1257	$ 5.00
#75	Bob Adamson	485-01-1411	$ 5.00
#443	Sheldon Fonda	072-16-0778	$ 5.00
#463	Wm. Woltemade	505-18-5236	$ 5.00
#463	Don Brehm	506-05-9943	$ 5.00
#777	Gene Anderson	467-05-7642	$ 5.00
#75	Warren Runyan	434-18-7284	$ 5.00
#271	Monroe Wilson	480-20-408	$ 5.00
		Trans.	$ 6.50
		Comm.	$ 7.00
		Profit	$ 10.00
			$ 70.00

Plaintiffs' Exhibit B-19.
Filed in U. S. District Court December 13, 1944.

231

Plaintiffs' Exhibit B-17.
Filed in U. S. District Court December 13, 1944.

#255	Wendell Hall	506-10-3312	$ 7.00
#463	Michael Moreno	503-09-1257	$ 5.00
#75	Bob Adamson	485-01-1411	$ 5.00
#443	Shhldon Fonda	072-16-0778	$ 5.00
#463	Wm. Woltemade	505-18-5236	$ 5.00
#463	Don Brehm	506-05-9945	$ 5.00
#777	Gene Anderson	467-05-7642	$ 5.00
#75	Warren Runyan	434-18-7284	$ 5.00
#271	Monroe Wilson	480-20-408	$ 5.00
		Trans.	$ 20.00
		Tax	$ 4.70
		Comm.	$ 10.00
		Profit	$ 18.30
			$100.00

Ex B-18
12/17/44 HEB

FILED
DEC 1 1944
M. T. Reed
CLERK

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 25 day of June, 194 2, between the undersigned employer (hereinafter called the employer and Nine (9) Men. musicians (hereinafter called employees) represented by the undersigned representative. (including Leader)

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Exposition Park Ft. Dodge, Iowa.	Sun. July 12, 1942	From 8:45 PM. - 12:15 AM.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: Mr. Larry Geer

Street Address: P. O. Box No. 5

City or State: Fort Dodge, Iowa.

Accepted by Employer: .....

Accepted: .....
(Orchestra Leader)

By: Vic Schroeder
(Representatives of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1299, Omaha, Nebraska.

77

No. 8353 A

Plaintiffs' Exhibit B-18.
Filed in U. S. District Court December 13, 1944

225

Plaintiffs' Exhibit B-18.
Filed in U. S. District Court December 13, 1944
227

#255	Wendell Hall	506-10-3312	$ 8.00
#463	Michael Moreno	503-09-1257	$ 6.00
#75	Bob Adamson	485-01-1411	$ 6.00
#463	Wm. Woltemade	505-18-5236	$ 6.00
#463	Don Brehm	506-05-9943	$ 6.00
#443	Sheldon Fonda	072-16-0778	$ 6.00
#777	Gene Anderson	467-05-7642	$ 6.00
#75	Warren Runyan	434-18-7284	$ 6.00
#271	Monroe Wilson	480-20-408	$ 6.00
		Trans.	$ -----
		Tax	$ 5.60
		Comm.	$ 10.00
		Profit	$ 28.40
			$100.00

Ex P-19
12/12/44
HEB

FILED
DEC 13 1944

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra | Gene Pieper and his Orchestra | Paul Moorhead and his Orchestra | Leo Pieper and his Orchestra | Skippy Anderson and his Orchestra | Ralph Slade and his Orchestra | Larry Herman and his Orchestra | Hank Winder and his Orchestra | Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 25 day of June, 194 2 between the undersigned employer (hereinafter called the employer and by the undersigned representative Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD.

according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Cobblestone Ballroom Storm Lake, Iowa.	Tue. July 14, 1942	From 9:00 PM. - 1:00 AM.

PRICE AGREED UPON IS $ 70.00 guaranteed; plus the privilege that the attraction may take (Terms and amount)

60% of gross receipts. (Gross earnings of the band not to exceed $100.00).

To be paid on or before conclusion of above engagement. (Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Plaintiff's Exhibit B-19.
Filed in U. S. District Court December 13, 1944.

Plaintiffs' Exhibit B-21.
Filed in U. S. District Court December 13, 1944.

#255	Wendall Hall	506-10-3312	$ 21.90
#75	Bob Adamson	485-01-1411	$ 5.00
#75	Warren Runyan	434-18-7284	$ 5.00
#443	Richard Fonda	079-05-3020	$ 5.00
#250	Eddie Lain	511-18-4775	$ 5.00
#250	David Rowland	506-20-4566	$ 5.00
#405	Lee Sanner	349-14-7351	$ 5.00
#777	Bernard Corrigan	496-12-6364	$ 5.00
#260	Ed Brauneau	391-10-0725	$ 5.00
		Trans.	$ 23.40
		Tax	$ 4.70
		Comm.	$ 10.00
			$100.00

The band showed up with only 7 men; 3 sax, drum, bass, trumpet, & console strings. Paul Moorhead played trumpet, not shown on above list. Wendall Hall salary is definitely not a fact and doubt if he would make an affidavit that above is correct. Tomorrow's contract shows different salary for him. Paul told Esther Talcott that he and Wendall Hall were the only two men left in the band from theabove list, and all others listed were not with the band.

239

Mr. Larry Geer

P.O. Box No. 5

Fort Dodge, Iowa.

SIGNED TO Vic Schroeder Agency Box 1290 Oma

Accepted by Employer

Accepted

(Orchestra Leader)

By

(Representative of Employees)

Omaha, Nebraska

No. 8354

EX B-20
12/12/44
HZB

FILED
DEC 1 1944

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra | Gene Pieper and his Orchestra | Paul Moorhead and his Orchestra | Leo Pieper and his Orchestra | Skippy Anderson and his Orchestra | Ralph Slade and his Orchestra | Larry Herman and his Orchestra | Hank Winder and his Orchestra | A. Edw. Dunmar Orchestra

THIS CONTRACT for the personal services of musicians, made this 28 day of June 194 2 between the undersigned employer (hereinafter called the employer and by the undersigned representative. Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Alhambra Ballroom (Twin Lakes) near Rockwell City, Iowa.	Thur. July 16th, 1942	From 9:00 P.M. - 12:30 A.M.

PRICE AGREED UPON IS: $85.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her, or their) authority to do so and hereby assumes liability for the amount stated herein.

Filed in U. S. District Court December 13, 1944.
Plaintiffs' Exhibit B-20.

Name of Employer Mr. Larry Geer Accepted by Employer

Street Address P.O. Box No. 8 Accepted (Orchestra Leader)

City or State Fort Dodge, Iowa. By (Representatives of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1290, Omaha, Nebraska.

No. 8355 A

233

#255	Wendell Hall	506-10-3312	$ 36.40
#75	Bob Adamson	485-01-1411	$ 6.00
#75	Warren Bunyan	434-18-7284	$ 6.00
#443	Richard Fonda	079-05-3020	$ 6.00
#250	Eddie Lain	511-18-4775	$ 6.00
#250	David Rowland	506-20-4566	$ 6.00
#405	Leo Sanner	349-14-7361	$ 6.00
#777	Bernard Corrigan	496-12-6364	$ 6.00
#260	Ed Bruneau	391-10-0725	$ 6.00
		Trans.	$ ---
		Tax	$ 5.60
		Comm.	$ 10.00
			$100.00

The band showed up with only 7 men but hired Mary Bodenstein for piano, making total of 8. See last night's contract.

Plaintiffs' Exhibit B-22.

243

Filed in U. S. District Court December 13, 1944.

Plaintiffs' Exhibit B-20.
Filed in U. S. District Court December 13, 1944.

235

#255	Wendell Hall	506-10-3312	$ 8.00
#463	Michael Moreno	503-09-1257	$ 6.00
#75	Bob Adamson	485-01-1411	$ 6.00
#443	Sheldon Fonda	072-16-0778	$ 6.00
#463	Wm. Woltemade	505-18-5236	$ 6.00
#463	Don Brehm	506-05-9943	$ 6.00
#777	Gene Anderson	467-05-7642	$ 6.00
#75	Warren Runyan	434-18-7284	$ 6.00
#271	Monroe Wilson	480-20-408	$ 6.00
		Trans.	$ 12.50
		Tax	$ 5.60
		Comm.	$ 8.50
		Profit	$ 2.40
			$ 85.00

Ex B-21
12/12/44
HEB

FILED
DEC 1 2 1944

VIC SCHROEDER AGENCY

Omaha, Nebr

Jimmy Barnett and his Orchestra | Gene Pieper and his Orchestra | Paul Moorhead and his Orchestra | Leo Pieper and his Orchestra | Skippy Anderson and his Orchestra | Ralph Slade and his Orchestra | Larry Herman and his Orchestra | Hank Winder and his Orchestra | Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 16 day of September, 1942, between the undersigned employer (hereinafter called the employer) and Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Laramar Ballroom Fort Dodge, Iowa.	(Over) Sat. October 10, 1942	From 9:00 P.M. - 12:00 P.M.

PRICE AGREED UPON IS $ 100.00 guaranteed. (Terms and amount)

To be paid on or before conclusion of above engagement. (Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist, against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Plaintiffs' Exhibit B-21:
Filed in U. S. District Court December 13, 1944.

VSA
THE SCHROEDER AGENCY

FILED
DEC 1 1944

VIC SCHROEDER AGENCY

Omaha, Nebr

Jimmy Barnett and his Orchestra | Gene Pieper and his Orchestra | Paul Moorhead and his Orchestra | Leo Pierson and his Orchestra | Skippy Anderson and his Orchestra | Ralph Slade and his Orchestra | Larry Herman and his Orchestra | Hank Winder and his Orchestra | Eddy Duncan and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 16 day of September, 194 2, between the undersigned employer (hereinafter called the employer) and Nine (9) Men. (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of PAUL MOORHEAD. according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Laramar Ballroom Fort Dodge, Iowa.	Sunday, October 11, 1942	From 8:45 PM. - 12:15 AM.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: Mr. Larry Coer

Street Address: P. O. Box No. 5

City or State: Fort Dodge, Iowa.

Accepted by Employer

Accepted (Orchestra Leader)

By (Representative of Employers)

RETURN ALL COPIES SIGNED TO Vic Schroeder Agency Box 1209 Omaha Nebraska

No. 9035 A

Plaintiffs' Exhibit B-22.
Filed in U. S. District Court December 13, 1944.

241

Ex B-23
12/12/44
H.E.B

FILED
DEC 13 1944
CLERK

VIC SCHROEDER AGENCY

Omaha, Nebr

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 16 day of September, 194 2, between the undersigned employer

Nine (9) Men.

(hereinafter called the employer and ..... (including Leader) ..... musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD

according to the following terms and conditions:

Place of Employment	Date(s) of Employment	Hours of Employment
Laramar Ballroom Fort Dodge, Iowa.	Sat. October 24, 1942	From 9:00 PM. - 12:00 M.

PRICE AGREED UPON IS $ 100.00 guaranteed.
(Terms and amount)

on or before conclusion of above engagement.

To be paid
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God; or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Plaintiffs' Exhibit B-23.
Filed in U. S. District Court December 13, 1944.

Name of Employer Mr. Larry Geer

Street Address P. O. Box No. [illegible]

City or State Fort Dodge, Iowa.

Accepted by Employer

Accepted (Orchestra Leader)

By Nadine Simmons (Representative of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1299, Omaha, Nebraska.

77

No. 9045 A

245

Plaintiffs' Exhibit B-23.
Filed in U. S. District Court December 13, 1944.
247

#255	Wendall Hall	506-10-3312	$ 21.90
#75	Bob Adamson	485-01-1411	$ 5.00
#75	Warren Runyan	434-18-7284	$ 5.00
#443	Richard Fonda	079-05-3020	$ 5.00
#250	Eddie Lain	511-18-4775	$ 5.00
#250	David Rowland	506-20-4566	$ 5.00
#405	Leo Sanner	349-14-7351	$ 5.00
#777	Bernard Corrigan	496-12-6364	$ 5.00
#260	Ed Bruneau	391-10-0725	$ 5.00
		Trans.	$ 23.40
		Tax	$ 4.70
		Comm.	$ 10.00
			$100.00

Band appeared with only 7 men. Again no piano player. Paul Moorhead was with the band.

7

Ex. B-24
12/12/44
HLB

VSA

VIC SCHROEDER AGENCY

FILED
DEC 1 [illegible] 1944
N. F. Reed
CLERK

VIC SCHROEDER AGENCY

Omaha, Nebr.

Jimmy Barnett and his Orchestra	Gene Pieper and his Orchestra	Paul Moorhead and his Orchestra	Leo Pieper and his Orchestra	Skippy Anderson and his Orchestra	Ralph Slade and his Orchestra	Larry Herman and his Orchestra	Hank Winder and his Orchestra	Eddy Dunsmoor and his Orchestra

THIS CONTRACT for the personal services of musicians, made this 13 day of January 1942 between the undersigned employer (hereinafter called the employer and by the undersigned representative Nine (9) Men (including Leader) musicians (hereinafter called employees) represented

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of

PAUL MOORHEAD according to the following terms and conditions,

Place of Employment	Date(s) of Employment	Hours of Employment
Cobblestone Ballroom Storm Lake, Iowa.	Tue. February 17, 1942	From 9:00 P.M. - 12:30 A.M.

PRICE AGREED UPON IS $ 70.00 guaranteed; plus the privilege that the attraction may take
(Terms and amount)

50% of gross receipts. (Gross earnings of the band not to exceed $100).

To be paid on or before conclusion of above engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accident to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Mr. Larry Geer

Street Address P. O. Box No. 5

City or State Fort Dodge, Iowa.

Accepted by Employer

Accepted (Orchestra Leader)

By Vic Schroeder
(Representatives of Employees)

RETURN ALL COPIES SIGNED TO: Vic Schroeder Agency, Box 1296, Omaha, Nebraska

77

No. 7131 A

Plaintiffs' Exhibit B-24.
Filed in U. S. District Court December 13, 1944.

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Plaintiffs' Exhibit B-24.
Filed in U. S. District Court December 13, 1944.

251

#463	Michael Moreno	503-59-1257	$ 6.50
#404	Robt. Ropor	507-14-6281	$ 5.00
#70	Arthur Koterba	508-16-8072	$ 5.00
#70	Harry Lorenzen	505-14-5524	$ 5.00
#70	Wendall Hall	506-10-3312	$ 5.00
#70	Neil Whitesides	507-03-5428	$ 5.00
#450	Russell Sapp	479-18-1007	$ 5.00
#70	Leo Rex (Mel) Wheland	506-09-5804	$ 5.00
#230	Merlin Jungers	484-09-4235	$ 5.00
TRANSPORTATION, TAXES, MISCL. & COMM.			$ 23.50
		TOTAL	$ 70.00

[fol. 315] Q. During the time that you have had your orchestra have you been interested in building up its reputation? A. Naturally.

Q. So that the orchestra will have public acceptance throughout the territory it plays? A. Yes.

Q. Were you during the year 1942 a member in good standing of the American Federation of Musicians?

A. I was.

Q. Were all of the sidemen of your orchestra during the year 1942 members in good standing in the American Federation of Musicians? A. They were.

Q. Was there any difference in the way your orchestra operated prior to June 1, 1941, and the way it operated afterward? A. No.

Q. And engagements were played in the same way; is that correct?

[fol. 316] A. That is right.

Q. Your relations with the sidemen were just the same?

A. Yes.

Mr. Roberts: I believe that is all of the direct examination.

Cross-Examination.

By Mr. Harold D. Cohen:

Q. Mr. Moorhead, when was the first engagement which you performed at the Crystal Ballroom?

A. When was the first I ever played there?

Q. Yes? A. I could not tell you.

Q. Well, was the first time on January 18, 1942?

A. That was not the first time nor the last. That was just one of the times.

Q. Now the contract for the engagement of January 18, 1942, was entered into June 25, 1941; is that right?

A. It must be if it says so there.

Q. Was that contract signed by you or someone acting in your behalf?

A. I don't think I signed it.

Q. It appears to have the signature of Mr. N. Timmons?

A. A lady.

Q. Was she authorized to make contracts on your behalf?

A. Yes; she was employed by the Vic Schroeder Agency.

[fol. 317] Q. Did you authorize the making of the contract for the engagement of yourself and the sidemen of your orchestra?

A. Not personally, but she worked for the agency.

Q. You authorized the agency?

A. That is right.

Q. It is also true with the other engagements which you performed at Larry Geer Ballrooms was contracted for by an agency authorized by you to contract for you and the sidemen of your orchestra; is that correct?

A. That is right.

Q. When did this contract of June 25, 1941, come to your attention after it was signed by Timmons?

A. It would not come up until ten days previous to the engagement when they are mailed out to the band.

Q. You knew at that time that you had this contract to perform at the Crystal Ballroom?

A. You knew a long time ahead that you were going to be there, but you never see the contract until ten days before.

Q. When you got the contract I assume you read it; is that right?

A. I read very little of it; how much and when.

Q. You did not repudiate the contract, did you?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness.

The Court: Sustained. (Defendant excepts).

[fol. 318] Q. Did you tell anyone that you would not be bound by any of the terms of the contract?

A. No.

Q. When you performed at the Crystal Ballroom and the Larry Geer Ballrooms was it your intention to perform according to the terms of the contract, and according to the rules and regulations of the American Federation of Musicians?

A. Naturally that is your intention.

Mr. Cohen: All right. No further questions.

Cross-Examination.

By Mr. Joseph A. Padway:

Q. Mr. Moorhead, I notice on a number of these exhibits, I won't refer to all of them, but I will pick out one or two at random, on the reverse side, let us take Exhibit B-6 which is an operating contract of the 13th day of January 1942 for nine men and $100.00 guaranty, and that is the one for the engagement of Sunday, February 22, 1942, from 8:45 to 12:15 designated hours of employment, Laramar Ballroom, Ft. Dodge, Iowa, place of employment, on the matter of transportation, taxes, miscellaneous and commission you have it set out at $44.00. In another instance you have transportation, taxes, commission and miscellaneous $53.50. Transportation is the [illegible]s you have [fol. 319] described?

A. Transportation is at the time figured one cent a mile a man.

Q. That was because it was fixed by rule and minimum charge? A. You could not travel for that.

Q. That was the minimum you could travel for under the union rules? A. Yes.

Q. Have you ever read this Constitution, or parts of it anyway?

A. I would say some.

Q. You know that rule is set forth on page 147: "Transportation charges per man must be made at not less than the lowest rate by available public transportation service, or of not less than one cent per mile per member if transportation is by privately owned automobile or other conveyance. If transportation for member or members is by privately owned automobile or bus it shall be unlawful for any leaders to accept or any members to fulfill an engagement which necessitates traveling by auto or bus a distance in excess of 400 miles within 24 hours." You were familiar with that rules, were you?

A. Yes, sir.

Q. You observed it, did you? A. Yes.

[fol. 320] Q. In here you show transportation, commission, miscellaneous expenses and taxes. Is that the tax, the one cent tax that the employee is liable to the Government for and that you have to pay?

A. Well, don't show that it was. That is what the secretary has put there and I imagine the tax might be con-

strued to be the ten percent levied by the Local at Ft. Dodge?

Q. That is right. There is a rule in the union that ten percent is to be added and later distributed to the men in the city where you come to play because you displace the Local men? A. To the National.

Q. It is not what I was trying to get out. It is not the Social Security Tax of the employer?

A. I would not think so.

Q. I had an idea without asking you. I am glad you set me right. So you have explained all these tax items is just the ten per cent tax that has nothing to do with Social Security?

A. I imagine that is right.

Q. That appears in a good many of your contracts here and there. I notice too in every one of these contracts that have been offered by Mr. Roberts that they are filled out with the number of men who play, and the amount of money they received; is that right? You have looked at [fol. 321] that, haven't you?

A. I doubt if I ever seen that outside of right here. That is probably somebody else's copy.

Q. Well, look at that now. A. Things we paid.

Q. You mean the rate?

A. No. The band showed up with only seven men.

Q. When you showed up with seven men you only got paid for seven? A. He hired Mary Bodenstine.

Q. In the contract when you agree to bring ten or eleven men you have to bring that many or substitute.

A. Yes, but suppose you can't get a substitute? That is when he hired Mary.

Q. Now who fills out this reverse side, this information? A. The Agency.

Q. The agency fills it out, does it? A. Yes.

Q. You did not do it personally then? A. No.

Q. Or at least no member of your orchestra?

A. No.

Q. But it was done by the agency? A. Yes.

Q. In fact the Vic Schroeder Agency furnishes these blanks?

[fol. 322] A. That is right.

Q. This exhibit on which you have set forth the itemized list of operating expenses, and referred to as B-1, also is furnished by the agency? A. Yes.

Q. It is a sort of an accounting you made so that you may know who was paid, what they were paid, what they were paid for, and what was used for transportation?

A. That is right. They are helpful for income tax.

Q. I suppose the Government appreciates that. My good friend failed to read that the bus had had deodorants, and you spent 25 cents for that.

Mr. Roberts: It is in there.

Mr. Padway: I beg your pardon.

Q. I notice that you have a number of items among other things, a number of items, let's look at it together, Social Security and Unemployment tax; you see that?

A. Yes.

Q. But it shows it blank, which would indicate you did not pay Social Security Tax or Unemployment tax. The fact of the matter is you did not pay any Social Security Tax on any of these engagements after Form B was used?

A. No, not with those dates. There was none after June 30, 1941.

Q. Now, did you hear Mr. Menke testify?

[fol. 323] A. Yes

Q. You heard his testimony as to the rules of the union respecting the leader must receive scale, the sidemen must receive scale, and the transportation and other expenses must be so computed in the scale as to leave scale; does that apply to you too?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness; and, of course, for the further reason that it requires him to be a mind reader as stated in my previous objection, but no objection on account of the general nature of the question.

The Court: Overruled. You may answer. (Plaintiffs except.).

(Question read by the reporter.)

A. Naturally it applies to me. We always cover it. We never play—I stop there.

Q. You stopped with it did apply to you; is that correct?
A. Yes.

Q. I don't want to put the words in your mouth, but are you familiar with the rules of the union that require you as a leader in fixing the price, or your agency in fixing the price for the employment of yourself and these men, that you must fix a price which will give the sidemen a minimum wage fixed by the union in the locality, and add to that the [fol. 324] expense of transportation, anticipated miscellaneous expenses, and so forth?

A. I am very aware of all of that.
Q. You do that in every engagement; is that right?
A. Yes.

Redirect Examination.

By Mr. Thomas B. Roberts:

Q. During 1942 were you paying your men above the union scale?

A. As the year went on it went much higher in January.

Q. As the year went on you paid them higher?
A. Yes.
Q. You paid them higher than the union scale?
A. Yes.

Mr. Roberts: That is all.

Witness Excused.

12:00 noon, court adjourned until 2:00 p. m., today, December 12, 1944.

Afternoon Session, December 12, 1944;

2:00 O'clock.

[fol. 325] WARREN L. LAWSON, called as a witness on behalf of the plaintiffs, and first duly sworn by the Clerk, testified as follows:

Direct Examination.

By Mr. Thomas B. Roberts:

Q. Will you give your name to the reporter?
A. Warren L. Lawson.
Q. Are you generally known by any other name?
A. Yes; "Doc" Lawson.

Q. Where do you live, Mr. Lawson?
A. Marshalltown, Iowa.
Q. Did you come here in response to a subpoena?
A. Yes.
Q. Your name ever identified with a band orchestra?
A. Yes.
Q. Just what was the name of the orchestra?
A. "Doc" Lawson's Orchestra.
Q. Can you tell us when that was that this orchestra was assembled? A. About 1921.
Q. And who assembled it? A. I did.
Q. Can you tell us the place?
A. Iowa City.
[fol. 326] Q. Has your orchestra been known since then as "Doc" Lawson's Orchestra?
A. Yes.
Q. You do not have an orchestra at the present time, do you? A. No, sir.
Q. During the period that the orchestra was in business I presume its performances consisted mainly in playing popular dance music?
A. Yes, sir.
Q. Tell the court what types of establishments or organizations that your orchestra played music for?
A. Theatres, clubs, Ballrooms, civic organizations, and various things like that.
Q. Most generally what is known as one night stands?
A. Yes, sir.
Q. Can you tell us who solicited these engagements?
A. I did.
Q. Did you ever send out any publicity matter?
A. Yes, sir.
Q. I hand you what the reporter has market Exhibit B-25, and ask you if that is a piece of publicity matter that you sent out? A. Yes, sir.
Q. That recites: Doc Lawson, Doctor of [Rythm], and His Orchestra?
[fol. 327] Q. "Midwest's Greatest Dance Band"?
A. Yes.
Q. Down at the bottom, "Available for engagements in the midwest. Write, wire, or 'phone, Marshalltown, Iowa". Is that right? A. Yes, sir.
Q. Did you pay for this publicity? A. Yes.

Q. Did you pay for the placard?
A. Yes, sir.

Mr. Padway: Is that you on that picture?

A. Yes.

Mr. Roberts: The plaintiffs offer in evidence Exhibit B-25.

Mr. Padway: You are a doctor of [rythm]. Is that the way you got the name "Doc"?

A. No, sir. That is just a nickname.

The Court: It will be admitted in evidence, no objection.

Doc LAWSON

"Doctor of Rhythm"
and His Orchestra

The Midwest's Greatest Dance Band

Plaintiffs' Exhibit B-26.
Filed in U. S. District Court December 13, 1944.

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Exhibit B-26
12-12-44
HEB

FILED
DEC 13 1944
N. T. Reed
CLERK

[fol. 330] Q. One further question, Mr. Lawson: You sent numerous placards such as Exhibit B-25 to various establishments? A. Yes, sir.

Q. I hand you Exhibit B-26. Is that a mat?

A. It is a mat. I can't tell what it is.

Mr. Roberts: It is stipulated that Exhibit B-26 is a picture mat of Doc Lawson playing at an electric organ.

Q. Can you tell what that mat was used for?

A. For newspaper work advertising.

Q. Advertising the orchestra?

A. In the places where we played, that is right.

Q. Did you furnish that mat to the establishments?

A. Yes.

Mr. Roberts: The plaintiffs at this time offer in evidence Exhibit B-26.

Mr. Padway: No objection.

The Court: It is admitted.

[fol. 331] Q. In what parts of the country did your orchestra play its engagements during the time of its existence? A. About thirteen States.

Q. Most of them here in the middle west?

A. Yes.

Q. Did you ever play over the radio?

A. Yes, sir.

Q. Now, do you recall, Mr. Lawson, whether your orchestra played at the Elhambria Ballroom at Twin Lakes, Iowa, on July 4, 1942? A. Yes, sir.

Q. Who was the operator of that place, or Ballroom, or establishment at that time?

A. Larry Geer.

Q. I will hand you what the reporter has marked Exhibit B-27 and ask you if your signature appears any place on that instrument? A. Yes, sir.

Q. And that is your signature of your name, Doc Lawson? A. Right.

Q. Is Exhibit B-27 dated May 27, 1942, for an engagement by Doc Lawson's orchestra—a contract for an engagement at the Elhambria at Twin Lakes on July 4, 1942?

A. Yes, sir.

Q. What do you recall as to how that particular engagement was booked, Mr. Lawson?

A. I imagine by letter.

Q. I hand you what has been marked by the reporter as Exhibit B-28. Do you find that that is a letter by you dated May 22, 1942, to Larry Geer?

A. Yes, sir.

Q. That is the letter where you said: "July 4th is open. Was booked in my home town, but they waited too long to get concessions, etc., and so aren't going to celebrate. Want $200 for the date. Let me know right away". Is that in the letter? A. Yes, sir.

[fol. 332] Mr. Roberts: The plaintiffs offer in evidence Exhibit B-27.

The Court: No objection. It is admitted.

Dues

EXHIBIT B27

Contract Blank 12-12-44

Marshalltown Federation of Musicians

FILED

DEC 13 1944

LOCAL No. 178, AMERICAN FEDERATION OF MUSICIANS

MARSHALLTOWN, IOWA

M. F. Reed

CLERK

THIS CONTRACT for the personal services of musicians, made this 24th day of May, 1942

between the undersigned employer (hereinafter called the employer) and 10 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the

leadership of Doc Lawson, according to the following terms and conditions:

Plaintiffs' Exhibit B-27.
Filed in U. S. District Court December 13, 1944.

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Place of employment Gaar Ballroom Alhambra, Twin Lakes

Date(s) of employment July 4th, 1942.

Hours of employment ~~XXXXXXXXXXXX~~ 9:00 P.M. to 12:30 A.M..

Price agreed upon $ 200.00
(Terms and amount)

To be paid Immediately after engagement.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer _____ Accepted by Employer Gary Gaar

Street Address _____ Accepted Lee Lawson
(Orchestra Leader)

City or State _____ By "Doc" Lawson
(Representatives of Employees)

Phone _____

FORM B

(1) Printed in U. S. A.

[fol. 334] Mr. Roberts: The plaintiffs offer in evidence plaintiffs Exhibit B-28.

Mr. Padway: No objection.

The Court: It is admitted.

Doc LAWSON

AND HIS ORCHESTRA .... BOX 99 .... MARSHALLTOWN, IOWA

May 22nd, 1942.

EXHIBIT B-28
12-13-44
HEB

FILED
DEC 13 1944
H. T. Reed
CLERK

Mr. Larry Geer
P.O. Box # 5
Fort Dodge, Iowa.

Dear Larry:-

July 4th is open--was booked in my home down, but they waited to long to get concessions, etc., and so arent going to celebrate..Want $200. for the date--let me know right away...

Regards,

Doc L.

"Doc" Lawson.

Plaintiffs' Exhibit B-28.
Filed in U. S. District Court December 13, 1944.

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[fol. 336] Q. Incidentally, Mr. Lawson, did you prepare the printed form Exhibit B-27?

A. No, sir.

Q. Can you tell the court where you obtained that form?

A. Musicians Union, Marshalltown, Iowa.

Q. That is a Local of the American Federation of Musicians? A. Yes, sir.

Q. Can you tell the court what is the customary name of the sidemen in an orchestra? I will withdraw that. Just tell the court about the sidemen in an orchestra—what they are?

A. They are just musicians.

Q. Musicians other than the leader, is that right?

A. That is right.

Q. Incidentally you were a leader of the orchestra during the time that [is] was in existence; is that right?

A. Yes.

Q. Who selected the sidemen in your orchestra who played the engagement at the Elhambria Ballroom, July 4, [fol. 337] 1942? A. I did.

Q. What can you tell us as to whether or not these sidemen were selected in advance of the date of the contract which was May 24, 1942?

A. I didn't get the question.

Q. What can you tell us as to whether you selected the men who played the engagement in advance of the date of the contract, May 24, 1942?

A. Yes, I did.

Q. I will hand you what the reporter has marked Exhibit B-29; does your signature appear anywhere thereon?

A. Yes, sir.

Q. Is that a letter dated December 19th, 1941, addressed to Mr. Larry Geer, Post Office Box No. 5, Fort Dodge, Iowa, from you?

A. Yes, sir.

Q. In this letter you stated: "I fired my whole band, and am starting out December 20th with all new men but two, and an entirely different style. As long as I am going commercial I might as well go the whole way. Have all my new men hired and rehearsing six days to start out on." What can you tell the court as to whether some of the men

you referred to in this letter were some of the men who played the engagement on July 4, 1942?

A. I could not answer that. I don't know.

[fol. 338] Q. Some of them might have been?

A. Might have been.

Q. You wrote the letter Exhibit B-29, is that right?

A. That is right.

Q. Are the facts stated in there true?

A. Yes, sir.

Q. Now in that letter I notice that you stated: "Am playing my last week with my present band and starting out December 20th with the old Dixieland band, a duplication of what I had three years ago when I was making the money. The people here want two tempo and I have been forcing four beat on them, or trying to rather, and not doing so well, so am going back to a duplication of the band I had three years ago, suit cases of novelties, breaking fiddles, burning straw hats, etc." What can you tell us as to whether you were referring to a style of orchestra performances there in those words?

A. Well, the letter is almost self-explanatory, because we were not getting much work with the type of band we had, so had to change.

Q. It was this type of Dixieland [rythm], the style that you used at the Elhambria Ballroom July 4th?

A. Yes, sir.

Q. You picked musicians that you thought would accomplish or bring about that style; is that right?

A. Yes, sir.

[fol. 339] Q. I presume you picked music arrangements for that purpose? A. Yes, sir.

Q. Incidentally, did you have a music library at that time? A. Yes, sir.

Q. And that is an arrangement library? A. Yes.

Q. Who paid for that library? A. I did.

Q. It was your personal property?

A. That is right.

Q. Now you mentioned something in this letter about firing your old band. I take it from that, that when you wanted to get rid of a sideman you told him his services were no longer needed, is that right?

A. With two weeks notice, yes sir.

Q. You refer to two weeks notice, and you refer to what, some requirement? A. That is right.

Q. You mean for the discharge of a sideman?

A. If he is working on a weekly basis, yes.

Q. Some of your men were during this period?

A. Yes.

Q. And those men, did you pay them a weekly wage?

A. Some of them, yes.

[fol. 340] Q. They were working on a weekly basis?

A. Yes.

Q. Did your weekly wage vary according to the number of engagements, or did you just pay them a flat sum?

A. That is right.

Q. Just paid them a flat sum, is that true?

A. Yes.

Q. That was during the time, and was true on July 4, 1942? A. That is true.

Q. On the occasion of the engagement of your orchestra at the Elhambria Ballroom who determined the order of the different dance pieces played, the dance selections during the evening? A. I did.

Mr. Roberts: I want to offer in evidence at this time, Your Honor, Exhibit B-29.

Mr. Padway: No objection.

The Court: It is admitted.

DOC LAWSON

AND HIS ORCHESTRA .... BOX 99 .... MARSHALLTOWN, IOWA

December 9th, 1941

Mr. Larry Geer
P.O. Box # 5
Fort Lodge, Iowa.

Dear Larry:-

Just returned from an 8 day trip and found your letter waiting. Can arrange the January 18th. Price $100. ten men. It is now booked at the Plamor Ballroom in K.C., but have just had to change the 17th so that I would have a 200 mile drive. If you want the 18th, let me know at once , so that I can make arrangements.

Am playing my last week with my present band and starting out December 20th with the old Dixieland band, a duplication of what I had three years ago when I was making the money. The people here want two beat tempo and I have been forcing four beat on them, or trying to , rather and not doing so well at it, so am going back to a duplication of the band I had three years ago, suit cases of novelties, breaking fiddles, burning straw hats, etc.....I fired my whole band and am starting out Dec 20th with all new men, but two, and an entirely different style. As long as I am going commercial, I might as well go the whole way. Have all my new men hired and rehearsing six days to start out on.

Let me know at once if you wish January 18th.

Kindest Regards,

"Doc" Lawson

"Doc" Lawson.

Plaintiff's Exhibit B-29.
Filed in U. S. District Court December 13, 1944.

[fol. 342] Q. Who determined the instrumentation of your orchestra during 1942? A. I did.

Q. Did the orchestra have a theme song?

A. Yes, sir.

Q. You selected that; is that correct?

A. That is right.

Q. Was it played at the beginning of the engagement?

A. No.

Q. At the end? A. Yes.

Q. At the end. Incidentally, Mr. Lawson, there was some reference to your being seated at an organ in this mat. You played an organ at that time? A. Yes, sir.

Q. And still do, of course? A. That is right.

Q. You played the organ and also led the orchestra too, is that right? A. That is right.

Q. Did you use the organ in connection with developing the tempo of the orchestra any way in starting or considering the orchestra music? A. No.

Q. How did you start the music? A. With my foot.

Q. A beat of some kind, a one-two?

A. That is right.

Q. And then during the course of the performance you would I suppose, regulate the volume by some signal to the orchestra; is that right? A. Once in a while.

[fol. 343] Q. Once in a while. Did you have any vocalists on the occasion of this engagement? A. No, sir.

Q. Did your orchestra have any special attire on the date of July 4th you played at Elhambria?

A. Yes, sir.

Q. Did you have anybody that selected that?

A. Yes, sir.

Q. You selected it? A. Yes, sir.

Q. Now did you use any music racks during the playing of the engagement on July 4th at the Elhambria Ballroom? A. Yes, sir.

Q. Who owned those? A. I did.

Q. And you brought them to Ft. Dodge with you, or Twin Lakes? A. Yes.

Q. Did your orchestra use a public address system during the performance of this engagement? A. Yes.

Q. Do you know whose that was; who furnished it?

A. We used two that night.

Q. Do you know who furnished the two?

A. I furnished one and L. Geer furnished the other one.

Q. Now just tell us how your orchestra travelled to [fol. 344] Twin Lakes for this engagement?

A. Sleeper bus.

Q. Sleeper bus? A. Yes, sir.

Q. Did you own that bus at that time? A. – Yes, sir.

Q. Have your name on the outside of it?

A. That is right.

Q. Doc Lawson's Orchestra? A. That is right.

Q. How many men would that bus sleep; how many men could sleep in the bus? A. Fourteen.

Q. Had some [births] of some kind in there?

A. That is right.

Q. That bus, I take it, was registered in your name?

A. Yes, sir.

Q. Now who paid for the gas, oil and tires on the bus?

A. I did.

Q. What can you tell us as to whether you had a special garage at your home in Marshallto n which kept the bus? A. That is right.

Q. Now did you rehearse, the band rehearse for six days?

A. I take it from that you mean from time to time did we rehearse?

[fol. 345] Q. Your orchestra? A. Yes.

Q. And tried to have the orchestra produce certain desired musical effects; is that right?

A. That is right.

Q. That is, the musical effect you wanted, or the style?

A. That depends on what the people want.

Q. You tried to develop the style the people would want, is that right? A. Yes, sir.

Q. In your home in Marshalltown what can you tell us whether you had a special room there for conducting rehearsals, recreation room?

A. Yes, a recreation room where we rehearsed.

Q. Now I note that the price for the engagement stated in the contract Exhibit B-27 is $200.00?

A. That is right.

Q. And can you tell us how that amount was paid, who received it? A. It was paid to me.

Q. Did you put in it a bank account? A. No, sir.

Q. Can you recall at this time whether you had anything left, any balance remaining after the expenses of that engagement?

A. I could not remember that now.

[fol. 346] Q. If there was a balance who received it—if there was any balance remaining? A. I did.

Q. I take it some years before, when you referred to the fact that you were making the money in Exhibit B-29, you had some profitable engagements in that period?

A. Yes, sir.

Q. Were there ever occasions when you had a loss?

A. Oh, yes.

Q. Who stood the loss? A. I did.

Q. Now, Mr. Lawson, were you during the year 1942 a member in good standing of the American Federation of Musicians? A. Yes, sir.

Q. And were all of the sidemen in your orchestra during 1942 members in good standing in the American Federation of Musicians? A. Yes, sir.

Q. Was there any difference in the way your orchestra operated after July 1st, 1941, as compared with the way it operated before that date?

A. Ask that question again.

Q. Was there any difference in the way your orchestra was operated? A. No.

Q. Just the same after June 1st 1941 as before?

[fol. 347] A. That is right.

Q. Your dealings with the sidemen the same?

A. Yes, sir.

Q. And with the Geers, were they the same, your dealings with the Geers? A. The same way, yes.

Q. You mentioned something here in a letter about your paying the men; what can you tell the court as to whether you paid above the union scale during 1942?

A. Away above the union scale.

Q. Away above—

A. Away above the union scale.

Q. I hand you what the reporter has marked Exhibit B-30; is that another letter signed by you to Mr. Larry Geer? A. Yes, sir.

Q. Dated October 12th, 1942? A. Yes, sir.

Q. You wrote that letter, did you not? A. Yes, sir.

Q. And that is a letter in which you stated: "I'm fighting a $365.00 per week payroll right now." Is that correct? A. Yes sir.

Q. Are the statements in that letter true? A. Yes, sir.

[fol. 348] Mr. Roberts: I will offer in evidence at this time, Your Honor, the plaintiff Exhibit B-30.

The Court: If there is no objection it may be admitted.

Doc LAWSON

AND HIS ORCHESTRA .... BOX 99 .... MARSHALLTOWN, IOWA

October 19th, 1942.

Mr. Larry Geer
P.O. Box #5
Fort Dodge, Iowa.

Friend Larry:-

Just got back from a trip and found your letter waiting. I dont know what to plan until I find out how much gas we are going to get. It will be tough on you and the bands also to work the nine day plan, as you told me, as the men are costing so darn much--I'm fighting a $365. per week payroll right now, and it will probably be tougher later on, as there are only a handful of men left, and they want double what they are worth, so will write you just as soon as I can find out enough to make plans.....

Chuck Coffee should be a good bet for you, if you can keep him sober---I imagine local bands will have to do the jobs in the localities where they are, if there isnt enough gas, and dont see how a road band can operate playing 4 and 5 nites a week, as as soon as the salaries stop, they go into defense work at big money--there arent any musicians left in the Tri-Cities---they are all working in the Rocklsland Arsenal, and that will run about the same in all the cities of any size. Sure hope Oklahoma raises enough hell to stop the gas rationing.

Well, will close for this time---we will just have to see what the hell happens--I'm afraid to plan very much, but just keep plugging away----of course this has to happen just when I get a fine band together...

Regards,

Doc Lawson

"Doc" Lawson.

P.S. Offer you December 25,26,27 at $450. (ten men) Dec. $250. for the Dec. 25th date.

Plaintiffs' Exhibit B-30.
Filed in U. S. District Court December 13, 1944.

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[fol. 350] Q. Incidentally, Mr. Lawson, the amount you paid the men during the year 1942, was the amount you determined; is that right? You mentioned the pay roll.

A. Yes, determined according to the union scale and over. At that time it was necessary to pay more to get the men.

Q. And you determined whatever amount that was?

A. They did.

Q. But you met their terms, is that right?

A. That is right.

Q. During the period that you had the orchestra, I believe you started back in the earlier twenties, did you try to develop a good reputation for musical entertainment? A. I tried to, yes.

Q. So your orchestra would have acceptance in these thirteen States you played in at various times?

A. Well, there was no intention of doing road work in 1921 at that time.

Q. Later on you tried to have public acceptance?

A. That is right.

Q. To develop the same showmanship that you accomp-
[fol. 351] lished; is that correct? A. Yes, sir.

Mr. Roberts: I believe that is all of the direct examination.

Cross-Examination.

By Mr. Harold D. Cohen:

Q. How long did you say you had been in the music business? A. Professionally?

Q. Professionally? A. Since 1921.

Q. Now in 1942 and '41, you got together a new aggregation of musicians to play as Doc Lawson's orchestra? A. A new bunch of men, you say?

Q. Yes? A. Yes, I changed men.

Q. Are you sufficiently familiar with the socalled custom among musicians to know whether it is the understanding that the leader of an orchestra is to get more for his services than the sidemen? A. Yes, sir.

Q. Is it not true, Mr. Lawson, that it is understood among musicians that the leader will bear certain expenses such as library, transportation and the like?

A. Yes, sir.

Q. And is it not true also that before an arrangements [fol. 352] such as that can be terminated either by you or by the sidemen that two weeks notice must be given between themselves? A. Yes, sir.

Q. So that if a sideman wants to leave an aggregation of musicians he has to notify you two weeks in advance; is that correct? A. Yes, sir.

Q. When you booked the engagement at Larry Geer Ballrooms was the price fixed with reference to the number of men whom you would bring to play at that engagement?

A. Yes.

Q. So that if you brought a greater number of men the price would be higher, and if you brought a fewer number it would be lower?

A. It usually worked out that way.

Q. Regardless of that you would agree that the remuneration would be at least sufficient to pay the union scale for the sidemen and the union scale for the leader, is that correct?

A. Yes, sir.

Q. You signed this contract for the engagement of July 4, 1942, yourself, did you not?

A. Yes, sir.

Q. Did you read the contract when you signed it?

[fol. 353] A. Yes, sir.

Q. You knew what was in the contract?

A. Yes, sir.

Q. Did you ever protest to Mr. Geer against signing that contract? A. No, sir.

Q. You signed it with full knowledge of its terms; is that correct? A. Yes, sir.

Mr. Cohen: I have no further questions.

Cross-Examination.

By Mr. Joseph A. Padway:

Q. Doc—I can call you Doc, can't I?

A. Yes, sir.

Q. You can call me Joe, if you want to. Doc, you have been in the band business for a long time, since 1921, I think you said. You have played some pretty long engagements out there, haven't you?

A. Yes, sir.

Q. What is the longest engagement that you recall that you played at any one time?

A. With the orchestra or by myself?

Q. With the orchestra? A. I can't recall.

Q. What? A. I can't recollect what the longest one was.

[fol. 354] Q. Ever play at a hotel? A. Some, yes.

Q. Ever play at a hotel for a month? A. No.

Q. Ever play any place as long as a month in all of those years?

A. Paramount Theatre here in Des Moines.

Q. How long did you play there?

A. Nearly three years.

Q. Three years? A. Yes, sir.

Q. Continuously? A. Yes, sir.

Q. With an orchestra? A. Yes.

Q. Whose orchestra?

A. Local Des Moines musicians.

Q. Were you the leader? A. No, sir.

Q. Who was? A. The master of ceremonies.

Q. What was his name?

A. Well, Charley Agnew, and Al Morey.

Q. Did that leader conduct his work or perform his work any different than you performed your work with your [fol. 355] band? A. Yes.

Q. What was the difference in the performance of the work?

A. Well his conduct was director of the band for the stage shows and was a band member, and most of my work has been strictly dance work when I had my band.

Q. So that the difference that he rendered music and directed music for the stage shows, whereas you did it for dances?

A. Practically the same.

Q. He would wield a baton, would he not?

A. Yes.

Q. He would sign the musicians, would he not?

A. No.

Q. He would seat the musicians?

A. They would just come up there and set down.

Q. He would place the first five men?

A. I don't understand what you mean now.

Q. He would arrange them?

A. Yes.

Q. That was done for the purpose of producing the best form of music; is that right? A. That is right.

Q. He would give the hours designated by the show house for the men to come and leave?

[fol. 356] A. Yes.

Q. It was fixed for him the same as it was for you in your contract? A. Yes.

Q. And he would rehearse his band, would he not?

A. Yes, sir.

Q. In the same manner you rehearsed yours?

A. Yes.

Q. And you as a sideman, and the extras, would be rehearsed by him? A. Yes.

Q. So to all intents and purposes the direction of the music in the music pit is no different than the production of dance music?

A. Except different type is all.

Q. That would also be true, the men in the pit in grand opera would produce music different than would a burlesque show? A. Yes.

Q. But the method or manner of doing the work is the same? A. Yes.

Q. And that is because of nature and employment of the musician? A. Yes, sir.

Q. The music is produced in that way?

[fol. 357] A. Yes, sir.

Q. How did you receive your pay at that time—from the leader? A. No.

Q. From the house? A. Yes.

Q. Who got the musicians together?

A. The contractor.

Q. Who was the contractor, these leaders?

A. No, sir.

Q. Who then?

A. Barney Barnard was the contractor.

Q. Barney Barnard was the contractor who got the contract for the band? A. Yes.

Q. When you went down in the theatre pit you were trained and rehearsed by that leader?

A. By the leader, not by the contractor.

Q. By the leader? A. Yes, sir.

Q. Who would hire an additional employee if he were needed? A. The contractor.

Q. Would the leader have nothing to say about that?

A. Not a thing.

[fol. 358] Q. He would have to take whoever the contractor sent there? A. That is right.

Q. Who did the firing? A. The contractor.

Q. Where was the contractor located?

A. He played in the band.

Q. He played in the band? A. Yes.

Q. What was his name?

A. The contractor was Barney Barnard.

Q. He was a musician? A. Yes.

Q. Then the leader was working under his direction, is that true? A. No.

Q. Under whose direction was he working?

A. Well, the theatre does a little different than in dance work because you take a contractor like this theatre up here he hired the men and they import their master of ceremonies from the circuit.

Q. Who is "they"?

A. The theatre managers.

Q. Then the managers import the master of ceremonies, and the contractor gets the band together?

A. That is right.

[fol. 359] Q. And the leader rehearsed them, that is right?

A. That is right.

Q. And the contractor hired them and fired them, you say? A. Yes, sir.

Q. And yet the wages were paid by the house, is that right? A. Yes, sir.

Q. Directly to the men?

A. That is right.

Q. And the house decided as to how many musicians it would want? A. Yes, sir.

Q. And it communicated that to the leader, didn't it?

A. Yes.

Q. And if the house wanted to fire a man they would indicate it to the leader and he would do the firing?

A. No; the contractor.

Q. I mean the contractor? A. Yes.

Q. The house would indicate to the contractor and the contractor would fire? A. That is right.

Q. In other words, the contractor stood really in the shoes of the leader so far as the management was concerned in the dance bands? A. That is right.

[fol. 360] Q. The only difference as I see, as you explain, between the traveling dance band, and the theatre band, as in this instance some fellow by the name of—

A. Barney Barnard—

Q. —he was the fellow that did the bossing, so to speak, with the consent and approval of the theatre?

A. That is right.

Q. You were a member of that band and know this from experience? A. Yes, sir.

Q. In twenty some odd years that you have traveled around the midwest you have an idea of how bands operate around the country? A. Yes, sir.

Q. You know there is a Chicago Opera Company and a Metropolitan Opera Company in the City of Chicago and the City of New York? A. Yes, sir.

Q. You know they have some musicians too, don't they? A. Yes, sir.

Q. You know it to be a fact, or don't you know it to be a fact that the Metropolitan Opera Company pays its musicians directly?

Mr. Roberts: Objected to as incompetent, immaterial and irrelevant and not cross-examination.

[fol. 361] The Court: Sustained. (Intervener excepts.)

Q. Well now the work, so far as the opera is concerned, I mean the music is, except for the type of music, rendered in the same manner as your music was rendered in this theatre in Des Moines?

Mr. Roberts: The same objection.

The Court: I don't know what it has to do with the case. We are interested in dance band orchestras and their organization and not something else. We will take it for what it is worth. (Plaintiffs except.)

Mr. Padway: I think it is material, Your Honor.

The Court: What difference does it make how some other organizations are controlled and organized?

Mr. Padway: Unless I am wrong it [make] this difference, it brings about this explanation, whether you play in the pit of a theatre, or grand opera, or a traveling band, how that music is conducted and managed is an essential element in the same way. It could not be otherwise. Group music must be that way. All this talk of management is not indicative of music or anything else. That is just the explanation.

Q. What was your answer to the last question?
A. Yes.
Q. You are familiar with the rules of the union?
A. Yes, sir.
[fol. 362] Q. With reference to fixing an amount that must cover the union scale for the union sidemen?
A. Yes.
Q. And an amount to cover incidental and traveling expense? A. Yes.
Q. You were governed by that rule? A. Yes, sir.
Q. You lived up to it and obeyed it? A. Yes, sir.
Q. And that was your intention when you signed the Form B contract? A Yes, sir.

Mr. Padway: That is all.

Redirect Examination.

By Mr. Thomas B. Roberts:
Q. I take it from your cross-examination that during the few brief intervals between 1921 and the time you ceased to have an orchestra you disbanded your organization during those short intervals? A. Yes.
Q. And one of those was this theatre engagement you testified about? A. That is right.
Q. During the entire period you did have the orchestra [fol. 363] it was known as Doc Lawson's orchestra?
A. Yes, sir.

Mr. Roberts: That is all.

Witness excused.

Lawrence V. Greer, called as a witness on behalf of the plaintiffs, and first duly sworn by the deputy clerk, testified as follows:

Direct Examination.

By Mr. Thomas B. Roberts:

Q. Will you give the reporter your name?

A. Lawrence V. Geer.

Q. Do you have a nick name? A. Larry Geer.

Q. Are you one of the plaintiffs in the suit of Larry V. Geer and Margaret Geer against Birmingham?

A. Yes.

Q. Who is Margaret Geer?

A. Margaret Geer is my wife.

Q. She have any relation to you in business?

A. She is my partner.

Q. What business is the partnership engaged in?

A. In the operation of Ballrooms.

Q. Do you have more than one Ballroom?

[fol. 364] A. We have a summer spot, and a winter spot. We have one in Fort Dodge, and we have a summer spot that operates only about 15 or 16 days during the summer months. We have one near Rockwell City at Twin Lakes, and we have a Ballroom at Storm Lake.

Q. Give the names of those Ballrooms?

A. Elhambria Ballroom north of Rockwell City, Laramar at Fort Dodge, and we have a spot at Fort Dodge known as Expo Park Ballroom, and the Cobblestone Ballroom at Storm Lake.

Q. How long has the partnership been engaged in the operation of Ballrooms? A. Since 1938.

Q. Prior to that date did you have any connection with Ballrooms? A. Yes, sir.

Q. What was that?

A. I owned and operated them before that.

Q. Just tell the court what the general nature of the business has been during the time that the partnership has operated the Ballrooms?

A. It is a branch of the entertainment field, I think. We cater to the public and expect them to come there for their recreation and amusement for dancing.

Q. For public dancing there, is that right?

[fol. 365] A. Yes, sir.

Q. Who is the manager of the partnership business?

A. Well, we both have separate duties.

Q. Who does most of the management?

A. I do most of the management and the operation.

Q. You just tell then what you do?

A. I book the bands and handle the publicity, and the general dance floor problems.

Q. How long have you been engaged in those duties?

A. For approximately 25 years, along there.

Q. You did that when you were not operating as a partnership, is that right? A. Yes, sir.

Q. You mentioned these dances, did you hold them during the years 1941 and 1942?

A. In Fort Dodge one place is closed while the other one operates, but we always operate on a regular policy of three nights a week. We in addition operated on holidays and occasionally for some special attraction that was coming there. At the Elhambria, north of Twin Lakes, we operated only once a week; at Storm Lake we operated regularly two nights a week, and in addition occasionally on a holiday or for some special attraction.

Q. Tell the court briefly what the capacity of your Ball-

[fol. 366] room is?

A. The Elhambria, I don't recall the feet, but it is a large place, I would say we could handle 2000 or more; the Laramar Fort Dodge, I think we can handle easily 2000 people; the Cobblestone perhaps 400 or 500, and the Expo Park about the same.

Q. Now you mentioned dancing, I presume you have to have some kind of music?

A. We use dance orchestras.

Q. Do you use a house band at either of these Ballrooms? A. No, sir.

Q. Tell the court what a house band is?

A. A house band is a band that belongs on the location of the engagement, as I understand it. They are hired by an establishment to play an engagement one week, or two weeks, or longer.

Q. Ballrooms do not operate that way, do they?

A. I don't think many of them do, because we do not operate enough nights during a week to have a house band.

Q. You usually have an orchestra every night?

A. Yes. We some times repeat with bands, of course.

Q. Now the engagements involved in this action were by orchestras during the years 1941 and 1942, is that right?

A. Yes, sir.

[fol. 367] Q. Was one of these orchestras known as Al Menke's? A. Yes, sir.

Q. Les Hartman and His Orchestra? A. Yes.

Q. Jimmy Barnett and His Orchestra? A. Yes.

Q. Paul Moorhead and His Orchestra? A. Yes.

Q. Blue Barron and His Orchestra? A. Yes.

Q. Doc Lawson and His Orchestra? A. Yes.

Q. I will hand you what the reporter has marked Exhibits B-31, B-32, B-33 and B-34, and ask you if these are the contracts for the Blue Barron orchestra engagements specified in your petition on file in this case?

A. Yes, sir.

Q. All of those exhibits bear your signature?

A. Yes, sir.

Mr. Roberts: I will offer in evidence plaintiffs Exhibits B-31, B-32, B-33 and B-34.

Ex B-31
12-12-44
HE B

Contract Blank

CONSOLIDATED RADIO ARTISTS, Inc.

30 ROCKEFELLER PLAZA, NEW YORK CITY — 333 NORTH MICHIGAN, CHICAGO, ILL. — 9028 SUNSET BOULEVARD, HOLLYWOOD, CALIF. — 111 SUTTER STREET, SAN FRANCISCO, CALIF.

THIS CONTRACT for the personal services of musicians, made this 30th day of May, 1943 between the undersigned employer (hereinafter called the employer) and 15 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BLUE BARRON, according to the following terms and conditions:

Name and Address of Place of Engagement ALHAMBRA BALLROOM, TWIN LAKES, IOWA

Date(s) of Employment JULY 9TH, 1942

Hours of Employment 9:00 P. M. to 1:00 A. M.

FILED
DEC 13 1944
N. F. Reed
CLERK

Filed in

Plaintiffs' Exhibit B-31.
in U. S. District Court December 13, 1944.

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CLERK

PRICE AGREED UPON $ 400.00 GUARANTEE, WITH A PRIVILEGE OF 50% OF THE GROSS RECEIPTS
(Terms and Amount)

To be paid DURING EVENING OF ENGAGEMENT
(Specify When Payments Are To Be Made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer LARRY GEER

Street Address LARAMAR BALLROOM

City or State FORT DODGE, IOWA.

Phone

Accepted by Employer Larry Geer

Accepted Blue Barron
(Orchestra Leader)

By CONSOLIDATED RADIO
(Representative of Employees)

Chris E. Green

FORM B

44 Printed in U. S. A.

Plaintiffs' Exhibit B-31.
Filed in U. S. District Court December 13, 1944.

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
1. Blue Barron (Leader)	802	283-10-8839	$
2. Stanley Usher	802	283-10-8831	
3. William Burkhardt	802	283-10-8829	
4. Walter Kimmel	802	090-09-7643	
5. William Hammond	802	283-10-8835	
6. Walter (Major) Matijatko	802	283-10-8841	
7. Andrew Russett	802	210-07-6675	
8. James Brown	802	210-07-6669	
9. Sam Bass	802	111-12-5157	
10. Charles Fisher	802	283-10-8836	
11. William Schiller	802	073-1444228	
12. Ivan (Lane) Leventhal	802	098-05-9293	
13. Billy Cover (Vocalist)		174-12-9753	

Ex. B-33
12/12/42
HFD

Contract Blank

CONSOLIDATED RADIO ARTISTS, Inc.

30 ROCKEFELLER PLAZA	333 NORTH MICHIGAN	9028 SUNSET BOULEVARD	111 SUTTER STREET
NEW YORK CITY	CHICAGO, ILL.	HOLLYWOOD, CALIF.	SAN FRANCISCO, CALIF.

THIS CONTRACT for the personal services of musicians, made this 28th day of May, 1942 between the undersigned employer (hereinafter called the employer) and 15 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BLUE BARRON according to the following terms and conditions:

Name and Address of Place of Engagement EXPO PARK BALLROOM, FORT DODGE, IOWA

Date(s) of Employment JULY 5TH, 1942

FILED

Name and Address of Place of Engagement EXPO PARK BALLROOM, FORT DODGE, IOWA

Date(s) of Employment JULY 8TH, 1942

Hours of Employment 8:45 P. M. TO 12:30 P. M.

FILED
DEC 1 3 1944
N. T. Reed
CLERK

PRICE AGREED UPON $ [redacted] GUARANTEE, WITH A PRIVILEGE OF [redacted] OF THE GROSS RECEIPTS
(Terms and Amount)

To be paid DURING EVENING OF ENGAGEMENT
(Specify When Payments Are To Be Made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer LARRY GENE

Street Address LAKESHORE BALLROOM

City or State FORT DODGE, IOWA

Phone

Accepted by Employer Larry Gene

Accepted CONSOLIDATED [illegible]
(Orchestra Leader)

By
(Representative of Employees)

FORM B
44 Printed in U. S. A.

Plaintiffs' Exhibit B-32.
Filed in U. S. District Court December 13, 1944.

295

Plaintiffs' Exhibit B-32.
Filed in U. S. District Court December 13, 1944.

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
1. Blue Barron (Leader)	802	[redacted]	$
2. Stanley Usher	802	[redacted]	
3. William Burkhardt	802	[redacted]	
4. Walter Kimmel	802	[redacted]	
5. William Hammond	802	[redacted]	
6. Walter (Major) Watrous	802	[redacted]	
7. Andrew Russell	802	[redacted]	
8. James Brown	802	[redacted]	
9. Sam Rose	802	111-12-8107	
10. Charles Fisher	802	[redacted]	
11. William Schiller	802	[redacted]	
12. Ivan (Lou) Leventhal	802	[redacted]	
13. Billy Gaver (Vocalist)		[redacted]	

EXHIBIT B-33
12-12-44
NEB

Contract Blank

CONSOLIDATED RADIO ARTISTS, Inc.

30 ROCKEFELLER PLAZA, NEW YORK CITY | 333 NORTH MICHIGAN, CHICAGO, ILL. | 9028 SUNSET BOULEVARD, HOLLYWOOD, CALIF. | 111 SUTTER STREET, SAN FRANCISCO, CALIF.

THIS CONTRACT for the personal services of musicians, made this 29th day of May, 1948

between the undersigned employer (hereinafter called the employer) and 18 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BLUE BARRON, according to the following terms and conditions:

Name and Address of Place of Engagement: COOLIDGE BALLROOM, STORM LAKE, IOWA

Date(s) of Employment: JULY 4TH, 1943

Hours of Employment: 9:00 P. M. to 1:00 A. M.

FILED
DEC 13 1944
N. T. Reed
CLERK

PRICE AGREED UPON: 600.00 GUARANTEE, WITH A PRIVILEGE OF 50% OF THE GROSS RECEIPTS DURING EVENING OF ENGAGEMENT
(Terms and Amount)

To be paid
(Specify When Payments Are To Be Made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum, supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: LARRY GEER

Street Address: LARAMAR BALLROOM

City or State: FORT DODGE, IOWA

Phone

Accepted by Employer: Larry Geer

Accepted: Blue Barron
(Orchestra Leader)

By
(Representative of Employees)

FORM B
Printed in U. S. A.

Plaintiffs' Exhibit B-33.
Filed in U. S. District Court December 13, 1944.

299

NAMES OF EMPLOYEES	LOCAL NUMBER	S.S. NUMBER	WAGES
1. Blue Barron (Leader)	802	233-10-8839	
2. Stanley Usher	802	285-10-8831	
3. William Burkhardt	802	255-10-8529	
4. Walter Kimmel	802	090-03-7543	
5. William Hammond	802	[illegible]	
6. Walter (Major) Matthews	802	[illegible] 8841	
7. Andrew Russett	802	210-07-6675	
8. James Brown	802	210-07-6689	
9. Sam Bass	802	111-12-8157	
10. Charles Fisher	802	258-10-8836	
11. William Schiller	802	073-14-4228	
12. Ivan (Lane) Lewenthal	802	066-05-9295	
13. Billy Gower (Vocalist)		174-12-9753	

Plaintiffs' Exhibit B-33.
Filed in U. S. District Court December 13, 1944.

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Ex B-34 44
12-12 HEB

[QUADREPLICATE]

Contract Blank

CONSOLIDATED RADIO ARTISTS, Inc.

30 ROCKEFELLER PLAZA
NEW YORK CITY

333 NORTH MICHIGAN
CHICAGO, ILL.

111 SUTTER STREET
SAN FRANCISCO, CALIF.

THIS CONTRACT for the personal services of musicians, made this 14th day of July, 1941

between the undersigned employer (hereinafter called the employer) and 12 (including Leader) musicians & 1 Entertainer (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the

Plaintiffs' Exhibit B-34.
Filed in U. S. District Court December 13, 1944.

FILED
DEC 1 1944
N. F. Reed
CLERK

leadership of BLUE BARRON according to the following terms and conditions:

Place of employment COBBLESTONE BALLROOM, STORM LAKE, IOWA.

Date(s) of employment TUESDAY, AUGUST 28TH, 1941

Hours of employment 9:00 P. M. to 1:00 A. M.

Price agreed upon $ 450.00 GUARANTEE, AGAINST A PRIVILEGE OF FIFTY PERCENT (50%) OF GROSS RECEIPTS.
(Terms and amount)

To be paid
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer LARRY [illegible]

Street Address

City or State FORT DODGE, IOWA.

Phone WALNUT [illegible]

Accepted by Employer

Accepted Blue Barron
(Orchestra Leader)

By CONSOLIDATED RADIO ARTISTS, INC.
(Representatives of Employees)

FORM B

303

NAMES OF EMPLOYEES		S. S. NUMBER	WAGES
Blue Barron	Local 4 & 802 (Leader)		$
William Buckhardt	" "	283-10-8839	10.00
Charlie Fisher	" "	283-10-8836	10.00
William Hammond	" "	283-10-8855	10.00
Walter Majon	" "	283-10-8841	10.00
Ronnie Snyder	" "	283-10-8840	10.00
Stanley Usher	" "	283-10-8831	10.00
William Zarembà	" "	283-10-8833	10.00
William Shiller	" "	073-14-4228	10.00
Ralph Flannigan	" "	210-07-6668	10.00
Jimmie Brown	" "	210-07-6669	10.00
Walter Kimmel	" "	090-09-7643	10.00
Lamar Shewell	" "	283-10-8837	10.00
Jimmie Palmer	(Vocalist)	241-12-2347	10.00
		Transportation	75.00

Plaintiffs' Exhibit B-34.
Filed in U. S. District Court. December 13, 1944.

[fol. 376] Q. I will hand you what the reporter has marked Exhibit B-35, and ask you if that is not a contract dated the 28th day of January 1942 for several engagements by Les Hartman and His Orchestra at the Laramar Ballroom, and Expo Ballroom, Fort Dodge?

A. Yes, sir.

Q. And the engagements listed on the reverse side of Exhibit B-35, are those engagements specified in your complaint on file in this case? A. Yes, sir.

Q. Your name appears on the exhibit in typewritten form? A. Yes, sir.

Mr. Roberts: The plaintiffs offer in evidence Exhibit B-35.

Mr. Cohen: Did you testify that you signed this contract, Mr. Geer?

A. No.

Mr. Cohen: You accepted it on behalf of the partnership?

A. I did not testify to that, but I did do that.

The Court: No objection. Admitted.

Ours

Exhibit B-35
12-12-44
HEB

Contract Blank

FILED
DEC 1 1944
N. F. Reed
CLERK

AMERICAN FEDERATION OF MUSICIANS

Local No. 334

THIS CONTRACT for the personal services of musicians made this 28th. day of January, 1942., 194

between the undersigned employer (hereinafter called the employer) and 7 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Les Hartmann., according to the following terms and conditions:

Name and Address of Place of Engagement Laramar & Exposition Ballrooms, Ft Dodge Iowa.

Date(s) of Employment On reverse side of Contract.

Hours of Employment 8:45 to 12:15 PM.

PRICE AGREED UPON : 70.00 each Engagement.
(Terms and Amount)

To be paid After each Engagement.
(Specify When Payments Are To Be Made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer Larry Gear.

Street Address

City, or State Ft Dodge Iowa.

Phone

Accepted by Employer

Accepted L. M. Hartmann
(Orchestra Leader)

By L. M. Hartmann
(Representatives of Employees)

FORM B
Printed in U. S. A.

Plaintiffs' Exhibit B-36.
Filed in U. S. District Court December 13, 1944.

307

Les Flatowers

(3)

NAMES OF EMPLOYEES		LOCAL NUMBER	S. S. NUMBER	WAGES
L.M.Hartmann.	(Leader)	334	478-18-1587.	10.00
George Tims.		"	479-05-3524.	8.00
Eddie Anderson.		"	349-10-0841.	7.00
Ted Conway.		"	485-05-8486.	7.00
Ernest Link.		"	484-16-8152.	7.00
Kenneth Shepard.		"	479-05-3764.	7.00
Justin Perkins.		"	479-05-3588.	7.00
Mileage, tax, general expense.				17.00
				70.00

Any or all dates may be cancelled on 30 Days written notice by either party

Feb.5th. March 5th. April 2nd. May 7th. June 4th. July 2nd.

August 6th. Sept.3rd. Oct.1st. Nov.5th. Dec.3rd. All 1942.

Plaintiffs' Exhibit B-35.
Filed in U. S. District Court December 13, 1944.

[fol. 379] Mr. Charlton: It is stipulated and agreed that contracts of the same form and tenor covering engagements specified in plaintiffs complaint as performed by Jimmy Barnett and His Orchestra, were executed in connection with the engagements as specified in paragraph five of plaintiffs' complaint, the form of said contracts being the same as Exhibit B-35.

Q. Now I gather that you represented the partnership in whatever dealings were had that led up to the execution of each of these contracts for these orchestras?

A. Yes.

Q. I will ask you if either you or Mrs. Geer prepared any of the contracts, that is, the printed form?

A. No, sir.

Q. From whom did you receive the contracts or contract in the case of each of these orchestras?

A. In the case of the bands that were booked directly by their own leader the contracts were received directly from the leader. Those that were booked through a booking office the contracts came to me from the booking office.

Q. Will you state whether any of these orchestras named in your petition, the six of them, [every] played engagements for you prior to the engagement specified in these contracts which have been identified and offered in evidence.

A. They all had, with the possible exception of Blue Barron, I think he had too.

Q. What can you tell the court, or do you know how long Les Hartman's orchestra had been in existence?

A. To my knowledge I would say he has been in business at least ten years prior to the engagements mentioned here.

[fol. 380] Q. What about Jimmy Barnett?

A. I would say about six years.

Q. Do you know anything about Blue Barron's orchestra?

A. I have, to my knowledge, I have known of Blue Barron's orchestra for probably ten years through trade magazines and radio programs.

Q. I will ask you if you are familiar with the style of each of these orchestras prior to the time you booked the engagements thereof? A. Yes, sir.

Q. How did you become familiar with the style of the music?

A. Through trade magazines and radio programs, and conversation with other orchestras and other dance operators, and some times through correspondence with the orchestra leaders describing their particular style.

Q. What about the booker? A. And the booker.

Q. That is where the booker handled the booking of the engagement? A. That is correct.

Q. Do you know where the headquarters of Les Hartman's orchestra is? A. Waterloo.

Q. Where is the headquarters of Jimmy Barnett?

A. I booked him through the booking office. I don't [fol. 381] know where his headquarters were.

Q. Do those bands play here throughout the middle west to [you] knowledge? A. Quite a good deal.

Q. What about Blue Barron, do you know anything about the territory his band covers?

A. To my personal knowledge I don't. From trade magazines and radio programs I know they were placed in quite a large territory, particularly in New York and New York City.

Q. What types of establishments or organizations do you know also had occasion to use Jimmy Barnett's orchestra and Les Hartman's orchestra for engagements?

A. They played at various ballrooms and civic organizations dances, firemens ball, convention parties.

Q. Those were bands playing one night stands?

A. Yes, sir.

Q. Now in the case of where any of these orchestras where the contract carries the name of a booking agency on the face of it, what can you tell us as to whether you had any conversation with the leader of those orchestras prior to the signing of the contract?

A. Well those contracts were always negotiated through the booker.

Q. You had no dealing with the leader?

[fol. 382] A. Not in regard to the booking of the band. I sometimes had conversation concerning bands.

Q. Did you have any conversation with the sidemen of any of the orchestras regarding the booking of the engagement? A. No, sir.

Q. In the cases of Al Menke, Doc Lawson and Les Hartman those engagements were not handled through a booking agent, were they? A. No, sir.

Q. In the case of the Al Menke orchestra engagement you dealt with Al Menke?

A. Yes, sir.

Q. And in the case of Les Hartman you dealt with Les Hartman? A. Yes.

Q. In the case of Doc Lawson you dealt with Doc Lawson? A. Yes.

Q. Did you have any conversation with the sidemen in any of those orchestras prior to the signing of the contract regarding the contract?

A. No, sir.

Q. Now you mentioned about the style of these orchestras, what purpose, if any, did you have in booking each of these orchestras?

[fol. 383] A. In the ballroom business we must have a variation in our form of orchestra music, and we try to secure different types of orchestra music to please different customers, and those different types of orchestra have a style that they have developed, in order to attract people to our ballrooms, and this particular style was what we were attempting to secure when we contacted these orchestras.

Q. On whom, if anybody, did you rely to bring you that style?

A. On the leader of the band.

Q. What, if anything, did you have to do, Mr. Geer, with arranging transportation of these six orchestras to the different ballrooms where their engagements were played?

A. Nothing.

Q. Any of them come by bus, do you know?

A. I think they all came by bus, with the exception of Blue Barron. He may have come on one of his engagements by privately owned automobiles.

Q. You have heard Paul Moorhead tell about his bus, and Doc Lawson tell about his bus; I suppose you have seen those buses?

A. Yes. Did you ask if I had told you about them?

Q. No. If you had seen them?

A. Yes, sir.

[fol. 384] Q. That is when they came to play these engagements, I suppose? A. Yes, sir.

Q. And to other engagements not involved in this suit, is that right? A. Yes.

Q. Do you recall whether the members of each of these orchestras wore some kind of special attire while playing the engagements? A. Yes, sir.

Q. What, if anything, did you have to do with that attire? A. Nothing.

Q. Did you at any time during the engagement of any of these orchestras have any conversation with the leader or sidemen regarding the dress or attire of the leader and the sidemen? A. No, sir.

Q. Did you have any rule in any of your ballrooms requiring the leader and sidemen to dress in any manner?

A. No, sir.

Q. And all of this you understand was true whenever these engagements were played?

A. Yes, sir.

Q. Where did the members of these orchestras sit during the playing of the engagements at one of the Geer ball[fol. 385] rooms? A. On the orchestra platform.

Q. Orchestra platform is in the ballroom?

A. Yes.

Q. What, if any, conversation did you have with the leader or members regarding the seating of the men on the band stand? A. None.

Q. Never talked about that? A. No, sir.

Q. Did you have occasion to observe that they some times had special seating arrangements for each of these orchestras?

A. They usually placed themselves in certain sections of their orchestra, the brass in one section, and the reeds in another section, and the drums some place in front or back.

Q. You had occasion to observe that while you were there? A. Yes.

Q. Do you know who placed the musicians in those places?

A. Presumably the leader. I did not.

Q. Now I believe you said that these orchestras were there to produce music for dances; what did they use?

A. Regular musical instruments that all dance bands use, saxophones, drums, trombones.

[fol. 386] Q. Did you furnish the instruments?

A. No. We have the house piano that remains there all of the time.

Q. That is the only instrument that was supplied?

A. That is right.

Q. What, if anything, did you say to the leader of each of these six orchestras regarding the instruments to be used in producing the music?

A. Nothing at all.

Q. Never gave any instruction of any kind on that?

A. No.

Q. Did you have any conversation with any of the sidemen during any of these engagements with reference to his instrument or the manner of playing it?

A. No, sir.

Q. What, if any, oral instructions did you give the leader of each of these orchestras either before or during the engagements involved in this suit with reference to the type of music to be played?

A. None whatsoever.

Q. What about the fast or slow pace?

A. They played to suit themselves to suit the crowd. That is what they were attempting to do.

Q. You never gave them any instructions?

A. No.

[fol. 387] Q. What about greater or less volume?

A. I never said anything about that.

Q. What about the specific selections to be played?

A. I had nothing to do with that.

Q. Did you give them any instructions on that?

A. No, sir.

Q. I mean by that, the leader or sidemen?

A. That is right.

Q. You never told them what particular piece to play?

A. No, sir.

Q. Is there any general understanding in the trade as to what the owner of a ballroom can do in any of those matters?

A. Well, it is generally recognized that the ballroom operator is in business to secure patrons to his place and for that purpose only he hires a band that has a distinctive style, and that is generally recognized in the business that if a ballroom operator would attempt to tell the leader of

that band how to vary his style the leader would pay no attentino to him, because it is the ambition of the leader of all bands that they want to become successful and get into what is known as the big money and they must through their own individual style and effort develop a following, and for that reason they will develop that as they see fit, [fol. 388] and they will accept no orders or instructions from any ballroom operator, and I think that is generally recognized in the business.

Mr. Padway: If the court please, we move to strike the answer, as incompetent, irrelevant and immaterial, and I want the objection to stand as being made before the answer, as it calls for the operation of all leaders, and not within the province of the witness to state, and contradicts the written contract in evidence, and it is pure speculation and conclusion.

The Court: Of course some times these things are a little difficult for the witness to express himself. Did you mean from what you said that that is what you observed about it from your own observation?

A. Yes, sir.

The Court: You are not guessing about it or giving your opinion, but it is from your own observation?

A. Yes, sir.

The Court: Overruled. (Intervener excepts).

Mr. Padway: I say that he was stating what he believed the leader had to do to build up a reputation and in building up a reputation they could not take orders from any one at all which we contend is highly speculative and can only come from the leaders themselves. It is entirely out [fol. 389] side of his scope and field and contrary to the written contract in evidence. If he wants to say that he talked with the leader, and he told him you cannot order me, that would be competent evidence, but he don't do that. I am here to say they can take orders under the rules, and I want to make my objection.

Mr. Charlton: You are an expert and enthusiastic.

Mr. Padway: I have made my objection, and the objection is made of record.

Mr. Cohen: As I understand the question was whether he understood the question in the trade as to relations between the orchestra and the establishment.

Mr. Charlton: The established custom and practice in the trade.

Mr. Cohen: It seems to me without any foundation for that, and it has to be hearsay? And furthermore, I don't think the opinion of other people is too general as to an orchestra, and is not material or relevant to the issues in this case.

The Court: It seems to me you are entirely too technical. It don't seem to me there is any question about the general makeup. It seems to me the facts are pretty well defined. There is no use trying to keep out some of the things that we all know. I don't understand we are trying to keep out [fol. 390] by some technicalities some evidence here. What we want is the general situation, and I think it is known by the attorneys what the general situation in. We don't want to put in evidence by anyone, but here is an operator of a dance hall who is dealing with these men and has had a chance to observe them and how they act, and how they act on the floor, how they acted generally, whether they acted independently or whether they put themselves under his control. All of those things are subject to observation. It seems to me you are entirely too technical on the matter that is not of a great deal of importance.

Mr. Cohen: I am technical only for the purpose of protecting the record.

The Court: You have a right to the record, of course.

Mr. Cohen: It seems to me there are plenty of men that know about that.

The Court: If he is going to be too technical withdraw it and ask him about it; go into all of the matters of what they did, and what their actions were, and what he did and observed after they arrived by bus, whether they brought their instruments with them, what they brought with them, and how they acted, and those things as he observed. You

can go into that if you want to. I will sustain that objection [fol. 391] and you can start over. (Plaintiffs except.)

Q. How long have you been in the business?

A. For approximately 22 or 24 years.

Q. And have you had occasion during that time to observe orchestras and what they did? A. Very much.

Q. How many orchestras have played at your establishments over that period would you say?

A. In the thousands.

Q. Have you had occasion to observe the conduct of the leader? A. Yes, sir.

Q. And their attitude toward you? A. Yes, sir.

Q. As the operator? A. Yes, sir.

Q. Now what can you tell the court as the result of your observations as to whether the leader would accept any direction or instruction with reference to the type of music, the fast and slower pieces, and the selection to be played, and these matters we have inquired about?

Mr. Padway: You say whether they would accept. Objected to as incompetent, immaterial and irrelevant.

The Court: Sustained. (Plaintiffs except).

Q. Well, did they accept?

[fol. 392] Mr. Padway: Objected to unless the particular leader is named, what he said to him and what the leader said.

The Court: Sustained. (Plaintiffs except).

Q. Mr. Geer, can you give an instance—. Mr. Geer, do you know what the customary practice is on the part of leaders with respect to these matters such as the type of music, faster or slower pieces, greater or less volume?

Mr. Padway: Objected to as incompetent, immaterial and irrelevant, and not going to the issues in the case, and not even provided by the agreement.

A. As I stated before, it is generally recognized—

Q. Answer that yes or no.

A. I could not give any leaders any orders. I don't know—

Q. Do you know what the general custom and practice is—

Mr. Padway: I think the witness has answered the question.

A. If you will, give me time to finish. Read it again.

(Question read by the reporter).

A. They play it to suit themselves exactly, and in order to satisfy the public whom they are trying to please in order to build up a reputation for themselves that would be pleasing to the public that come to the dances and dance to their music.

Q. They give all of the instructions on those matters, is [fol. 393] not that right, in the ballroom?

A. Who do you refer to by "they?"

Q. The leader? A. Yes, sir.

Q. You did not give any instructions regarding any of those matters? A. No, sir.

Q. What, if any, written orders or instructions did you ever give any of these orchestras? A. None.

Q. That is true you did not give any written instructions either prior to or during the performance of the engagement, is that right?

A. No, sir, that is right.

Q. What can you tell the court as to whether each of these six orchestras in playing its engagement used a public address system? A. They all did.

Q. And can you tell the court whose address system that was?

A. We have a public address system in each of our places, and all of the bands, with the possible exception of Blue Barron carried their own public address system, and in case they liked theirs better they played or used it, otherwise any public address system.

[fol. 394] Q. Did you have anything to do in regard to setting them up? A. No, sir.

Q. Give any direction with regard to setting up these public address systems? A. No.

Q. Did each of these orchestras in performing its engagement use music racks? A. Yes, sir.

Q. Did you supply those racks? A. No, sir.

Q. Someone brought them there, is that right?

A. Yes, sir.

Q. Now what instructions, if any, did you ever give the leader or members of any of these six orchestras with ref-

erence to the route used in reaching or leaving the band stand? A. None.

Q. You heard Mr. Moorhead testify that it was the custom for an orchestra playing a one night engagement to take an intermission? A. Yes, sir.

Q. Was that custom followed in the case of your ballrooms? A. Yes, sir.

Q. What can you tell the court as to whether each of [fol. 395] these orchestras did take an intermission?

A. They did, yes sir.

Q. State what order, if any, you gave the leader of any of these orchestras, or the [sidement] of these orchestras either prior to or during the engagements with reference to taking an intermission?

A. Did not give them any orders in regard to that.

Q. Did you have a room to which they are to retire?

A. No. We have a room where they store their baggage, but they can go any place they want to.

Q. You did not try to tell them about their conduct during the intermission? A. No, sir.

Q. You did not tell them? A. No, sir.

Q. Now in the case of each of these orchestras was there anything on the music racks in front of the orchestra?

A. Their music arrangements.

Q. Some kind of sheet music? A. Yes, sir.

Q. Did you have anything to do with furnishing that sheet music? A. No, sir.

Q. Now did you ever give any instructions to any leader of any of these bands, or the members of any of these [fol. 396] orchestras with reference to rehearsals?

A. No, sir.

Q. You never rehearsed any of these orchestras?

A. No, sir.

Q. Did you have occasion to observe these leaders while the orchestra was on the band stand? A. Yes, sir.

Q. What would the leader be doing there with the orchestra during the performance of the engagement?

A. He would be directing the band, running it.

Q. Some of them use a baton? A. Yes, sir.

Q. Did you observe anything with reference to his regulating the volume of music?

A. The leader took care of that.

Q. Through some manipulations with the baton, is that right?

A. Yes, generally by his hand.

Q. Who instructed the orchestra to play the dance selections? A. The leader.

Q. You observed that. Did some of these orchestras have feature numbers? A. Yes, sir.

Q. Did you have anything to do with the time that they put on their act, I mean when they did it during the course of their engagement?

[fol. 397] A. No, sir.

Mr. Padway: I think I can see now that we are not going to get through with the evidence, and I probably have to call off some train arrangements.

The Court: If you want to make some telephone calls I will give you fifteen minutes. We will take a recess of fifteen minutes.

(Recess 3:10 P. M. to 3:25 P. M.)

The witness Lawrence V. Geer resumed the stand and on further direct examination, by Mr. Thomas B. Roberts, testified as follows:

Q. Mr. Geer, calling your attention now for a moment to plaintiffs Exhibit B-22, I will ask you to examine the reverse side of that exhibit the typewritten words "Band showed up with only seven men and hired Mary Bodenstine for piano making a total of eight." These words were written by you? A. Yes, sir.

Q. Tell this court what that is a memorandum of, what the facts are?

A. I keep records on certain things of that kind, and that night the band showed up with apparently less than the number called for, and they hired someone else to fill in.

Q. Did you hire Mary Bodenstine?

[fol. 398] A. No; the band leader hired her.

Q. Mr. Geer, I hand you what the reporter has marked Exhibit B-36 and ask you if that is a summary showing the amount which the partnership paid as the contract price in the case of each engagement involved in this action? A. Yes, sir.

Q. And the information shown thereon is correct?

A. Yes, sir.

Q. According to the records of the partnership?

A. Yes, sir.

Q. Some places where the notation is "Privilege of 60 percent," that signifies the orchestra cut into the profit that night?

A. The privilege of 60 per cent means that they have the privilege of doing that. Some times they go into it and some times they don't. The record will show whether they did or not. In that instance they had the privilege of 60 per cent.

Q. In other words where it is below the figure the privilege of 60 per cent was in parenthesis, that means that night the privilege of the percent of the contract was operative? A. Yes, sir.

Q. To whom was that money paid?

A. The orchestra leader.

[fol. 399] Q. Who exercises this privilege you refer to?

A. It is in the contract—the orchestra leader.

Q. He is the one that exercised it? A. Yes, sir.

Mr. Roberts: The plaintiffs offer in evidence Exhibit B-36.

Mr. Padway: No objection.

Mr. Cohen: No objection.

The Court: It is admitted.

[fol. 400] Plaintiffs' Exhibit B-36.

Filed in U. S. District Court December 13, 1944.

Name or Orchestra	Date of Engagement	Amount Paid As Contract Price
Al Menke	October 12, 1941	$120.00
	October 18, 1941	120.00
	November 8, 1941	120.00
	November 26, 1941	120.00
	November 26, 1942	250.00
Les Hartman	February 5, 1942	70.00
	March 5, 1942	70.00
	April 2, 1942	70.00
	May 7, 1942	70.00
	June 4, 1942	70.00
	July 2, 1942	70.00
	August 6, 1942	70.00
	September 3, 1942	70.00
	October 1, 1942	70.00

Jimmy Barnett	January 5, 1942	75.00
	January 24, 1942	100.00
	April 25, 1942	89.00
		(privilege of 60%)
	June 16, 1942	89.00
		(privilege of 60%)
	July 2, 1942	85.00
	July 3, 1942	150.00
	July 4, 1942	150.00
	August 1, 1942	100.00
	August 8, 1942	100.00
	September 12, 1942	100.00
	October 4, 1942	100.00
	November 7, 1942	100.00
	November 14, 1942	100.00
	November 15, 1942	100.00
	November 17, 1942	82.44
		(privilege of 60%)
	December 5 & 6, 1942	220.00
	December 22, 1942	85.00
Paul Moorhead	February 17, 1942	100.00
		(privilege of 60%)
	February 22, 1942	100.00
	March 21, 1942	100.00
	March 22, 1942	100.00
	April 18, 1942	100.00
	May 2, 1942	100.00
	May 9, 1942	100.00
	May 16, 1942	100.00
	May 28, 1942	90.00
	May 31, 1942	100.00
	June 2, 1942	70.00
		(privilege of 60%)
	June 30, 1942	75.00
	July 11, 1942	100.00
	July 12, 1942	100.00
	July 14, 1942	72.66
		(privilege of 60%)
	July 16, 1942	85.00
	October 10, 1942	100.00
	October 11, 1942	100.00
	October 12, 1942	70.00
		(privilege of 60%)
	October 24, 1942	100.00

[fol. 401]

Blue Barron	August 26, 1941	$554.42 (privilege of 56%)
	July 4, 1942	710.22 (privilege of 50%)
	July 5, 1942	463.30 (privilege of 50%)
	July 9, 1942	400.00 (privilege of 50%)
Doc Lawson	July 4, 1942	200.00

[fol. 402] Q. What, if any, conversation did you ever have with Al Menke in reference to his orchestra engagement, or Jimmy Barnett on the occasion of his orchestra engagement, or Paul Moorhead on the occasion of his orchestra engagement, or Blue Barron on the occasion of his orchestra engagement, or Doc Lawson on the occasion of his orchestra engagement, regarding the compensation of the sidemen of each of these organizations? A. None.

Q. You never talked to any of the leaders involved in this law suit about what the sidemen received for their services? A. No, sir.

Q. What conversation, if any, did you have with any of the sidemen of any of these six orchestras regarding the amount they received for the services performed in these [fol. 403] engagements at your ballrooms? A. None.

Q. Did you have any conversation with the sidemen or any of them in any of these orchestras regarding any compensation of any kind? A. None.

Q. Now on a number of these contracts there is printed information concerning the list of the members of the orchestra, the social security numbers, and in some cases amounts shown as wages on the reverse side of these contracts. What, if anything, did you have to do with preparing that information? A. Nothing.

Q. When I said printed you understood I meant the typewritten entries? A. Yes.

Q. That is true of all contracts in this action on which such typewritten entries appear on the reverse side thereof; is that correct? A. Yes, sir.

Q. Some of the contracts, of course, have no information on the reverse side; is that right?

A. That is right.

Q. In those cases where no information appears on the reverse side of the contracts in evidence in this case [fol. 404] what can you tell the court as to whether you ever received a separate memorandum from anyone showing what compensation was received by the sidemen?

A. No sir; I never got anything.

Q. And in those instances where no information appears on the reverse side of the contract, what can you tell the court as to whether you received any receipts of sidemen showing what they received for the engagements in which they participated? A. I never got anything.

Q. You never got any receipts for anything of that sort? A. No, sir.

Q. Incidentally, Mr. Geer, can you tell us what the union scale of compensation of musicians was at the Fort Dodge Local during the years 1941 and 1942?

A. I believe it was $5.00 for a three hour engagement, and after that it was fifty cents for each half hour over that. I am not definitely sure of that, but it was not over $6.00, I know.

Q. Now [—] one of your ballrooms located in the jurisdiction of any other Local of the American Federation of Musicians? A. Storm Lake is.

Q. What jurisdiction is that? A. Spencer.

[fol. 405] Q. Do you know what the union scale of that Local was for musicians performing one night engagements? A. That was $5.00 for four hours.

Q. Now, Mr. Geer, where we have amounts appearing on the reverse side of any of these contracts introduced in evidence in this cause, what can you tell the court as to whether you had anything to do with determining those amounts? A. No, sir.

Q. You had nothing to do with the amounts?

A. I had nothing to do with them; no, sir.

Q. I call your attention for the moment to plaintiffs Exhibit B-34, and specifically to the reverse side of the exhibit, and I notice in the column "Wages" the sum of $10.00 there listed opposite the names of some of the men; is that right? A. Yes, sir.

Q. What can you tell us as to whether that amount of $10.00 shown on the reverse side of Exhibit B-34 is above or below the union scale of the Spencer Local?

A. $10.00 is double the amount of the Local scale.

Q. Did you have anything to do with fixing that amount, or those amounts, shown on the reverse side of the exhibit I have just inquired about?

A. I had nothing to do with it.

Q. Wherever on any of these contracts an amount ap-
[fol. 406] pears in excess of the union scale you have testified to, what can you tell us as to whether you had anything to do with fixing that excess amount?

A. I had nothing to do with that.

Q. What can you tell the court as to whether you know what the men actually received in fact for each of these engagements?

A. Referring to that contract, that is the Blue Barron contract, Blue Barron told me at one time his men received an average of approximately $150.00 per week per man, weekly salary.

Q. He told you that? A. He told that, yes sir.

Q. What can you tell the court as to whether the plaintiffs have ever carried the names of any of the leaders or the sidemen of any of these six orchestras that have been inquired about on their payroll?

A. No, we did not.

Q. That was true during 1941 and 1942, whenever these engagements were, is that right? A. Yes, sir.

Q. Now I will ask you, Mr. Geer, what, if anything, did you have to do with selecting any of the sidemen who performed these engagements as members of these various orchestras?

[fol. 407] A. Nothing.

Q. You never talked with anyone about joining one of these orchestras, did you? A. No, sir.

Q. That is, you did not talk with anyone; is that right?

A. Yes, sir.

Q. Did you ever have a conversation with any of the leaders with reference to the selection of a sideman?

A. No, sir.

Q. That is, the sidemen of any of these orchestras?

A. No, sir.

Q. What can you tell the court as to whether you ever discharged any sideman of any of these orchestras involved in your case?

A. No, I never discharged any of them.

Q. Ever tell one of them to leave the orchestra?

A. No, sir.

Q. Did you ever say anything to Al Menke, Blue Barron, Paul Moorhead, Jimmy Barnett, Doc Lawson, or Les Hartman with reference to his discharging some sideman in his orchestra? A. No, sir, I did not.

Q. Or any particular sideman? A. No, sir.

[fol. 408] Q. You never discussed that with them?

A. No, sir, I never discussed that with them at all.

Q. Now I believe you testified earlier in this examination that most of these orchestras had played for you prior to June 1, 1941? A. Yes, sir.

Q. What difference, if any, was there in what the sidemen and leaders of these men did when they played for you prior to June 1, 1941, and what they did when they played for you on the engagements involved in this action? A. There was no difference.

Q. No difference whatever? A. No, sir.

Q. I believe in this suit you are seeking to recover the employees tax in the Federal Insurance Contribution back, as well as the employers? A. Yes, sir.

Q. What can you tell the court as to whether you ever withheld that employees tax from any of the amounts paid to the leaders, as you testified? A. We never did.

Q. That is the partnership funds?

A. Yes, sir.

Q. One further question occurs to me: I notice in all of [fol. 409] these contracts there are hours stated?

A. Yes, sir.

Q. What can you tell the court as to the practice as to whether these orchestras stayed within the hours?

A. Yes, sir.

Q. They stopped at the time specified in the contract for the engagement? A. Yes, sir.

Mr. Roberts: I believe that is all.

Mr. Padway: No cross examination.

Mr. Cohen: No questions.

Witness excused.

[fol. 410] Mr. Charlton: The plaintiffs offer in evidence the depositions of the witnesses Griff Williams, James E. Breyley, and Joseph L. Kayser, as certified and brought to court and signed by the respective reporters and now in the custody of the Clerk.

The Court: All right. They may be admitted.

Mr. Charlton: It is understood and agreed that the objections appearing in the depositions and made at the time of the taking of the depositions may stand as though made in open court.

[fol. 421] Deposition of Griffith E. Williams.

Filed in U. S. District Court September 29, 1944.

And the said,

GRIFFITH E. WILLIAMS, produced as a witness on behalf of plaintiffs, having been by me, the said Frank M. Harker, as Notary Public, as aforesaid, first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth insofar as he should be interrogated, was examined upon oral interrogatories, and he did thereupon depose, testify and say as follows, viz.:

Direct Examination.

By Mr. Roberts:

Q1. Will you give your name to the reporter?

A1. Griffith E. Williams.

Q2. Your present address?

A2. You want my business address, or my address here?

Q3. Well, your home address will be all right.

A3. 3214 Thayer street, Evanston, Illinois. My business address is Band Office Building No. 3, Great Lakes Naval Training Center, Great Lakes, Illinois.

Q4. You are at present a Lieutenant, Junior Navy Grade, in the Navy?

A4. Yes, I am.

[fol. 422] Q5. What day did you report for duty as an officer?

A5. For active duty?

Q6. Yes.

A6. On the 28th of February.

Q7. Of this year? A7. Right, 1944.

Q8. And what did you do before you entered the Navy?
A8. I was the leader of a dance orchestra.
Q9. Name the orchestra.
A9. Griff Williams and His Orchestra.
Q10. Are you the same Griff Williams who was the plaintiff in the action entitled: Griff Williams vs. United States, that was filed in the United States Court, for the Northern District of Illinois, decided about in May, 1941?
A10. Yes, I am.
Q11. That is the same case that was later appealed to the Seventh Circuit Court of Appeals?
A11. Yes, sir.
Q12. I now ask you a little history about your orchestra. Do you recall the date—I mean by that the year—when it was first assembled?
A12. Yes; it was 1934.
Q13. And who assembled it?
[fol. 423] A13. I did.
Q14. And the place where it was assembled?
A14. San Francisco.
Q15. And what year was it that the orchestra was first known as "Griff Williams and His Orchestra"?
A15. It was not well known.
Q16. When did you first start using the name, I will say?
A16. The minute it was assembled.
Q17. And that was back around 1934?
A17. 1934.
Q18. And commencing about that time, from then on, was it booked and known as "Griff Williams and His Orchestra"?
A18. With the exception of about nine months after it had been assembled—I think I am correct—it became known as "Griff Williams and Jimmie Walsh and Their Orchestra" for a period of about six or eight months.
Q19. At the first? A19. Yes.
Q20. And then after that?
A20. Then after that, this partnership ended and it became "Griff Williams and His Orchestra" again.
Q21. How long did that orchestra remain in existence?
[fol. 424] A21. Until 1944.
Q22. When you went into the Navy?
A22. Yes.

Q23. Now, during the period it was in existence, its performances consisted mainly of the playing of popular dance music? A23. Yes.

Q24. And your orchestra was organized or assembled, not for any particular engagement, but for all types of engagements?

A24. No, it was assembled originally for engagement at the Edgewater Beach Cafe in San Francisco.

Q25. For a single engagement there?

A25. Yes. Well, for steady engagement.

Q26. For steady engagement. Incidentally, what is a steady engagement?

A26. A steady engagement would be anything—I imagine you would consider a steady engagement anything from two months' duration; even two weeks in some ways it might be considered.

Q27. That is right. Do you recall whether the bylaws of the Federation of Musicians has any definition of "steady engagement"?

A27. That I don't recall.

Q28. Now, later on you did hold yourself out ready to [fol. 425-426] perform engagements for other types of establishments, is that true?

A28. Yes.

Mr. Wilson: I object to the form of the question, "he held himself out."

Mr. Roberts: I will rephrase it.

By Mr. Roberts:

Q29. Later the orchestra played engagements for other types of establishments, is that right?

A29. Specifying, rather than a cafe, ballrooms, yes.

Q30. Will you just name a few of those?

A30. I played the Aragon Ballroom, the Trianon Ballroom; and Sweet's Ballroom in Oakland, California; the Chumot Ballroom in Omaha, Nebraska; quite a few of them.

Q31. Did you also play at amusement parks?

A31. Yes.

Q32. Do you recall playing for the State Fair at Des Moines? A32. Yes.

Q33. Do you remember when that was?

A33. I played there twice; I believe in '40—1939 and 1940.

Q34. Do you recall playing at a policemen's ball in Sioux City?

[fol. 427] A34. Yes, it was 1941.

Q35. Did you sometimes play for American Legion Post dances?

A35. Yes; in Clinton, Iowa.

Q36. You sometimes played for colleges?

A36. Yes. Want me to name some?

Q37. You may name one or two.

A37. University of Iowa; I played for the University of Nebraska at Lincoln; Texas A. & M.

Q38. When we say you played, we refer, of course, to you and your orchestra, is that correct?

A38. Right.

Q39. And these engagements during the later years of the orchestra's existence occurred at various intervals during those years, is that right?

A39. Yes.

Q40. And those engagements usually were how long in duration; that is, in ballrooms and amusement parks?

A40. One or two days. Amusement parks—I would specify that I played four weeks to five weeks at amusement parks.

Q41. Now, if a ballroom wanted a dance, or a Legion Post, that would be one or two days?

A41. One or two days, generally.

[fol. 428] Q42. And those are known in the trade as single engagements?

A42. Single engagements, or one-nighters.

Q43. One-night stands? A43. Yes.

Q44. You might also give the names of a few hotels at which your orchestra appeared during the years of its existence.

A44. Mark Hopkins, San Francisco; Stevens Hotel in Chicago, Baker Hotel in Dallas, Texas; Copley-Plaza Hotel, Boston; and the Palmer House in Chicago.

Q45. You were playing at the Palmer House when you received your Commission in the Navy, isn't that correct?

A45. No. I was at the Chase Hotel in St. Louis.

Q46. Chase Hotel, St. Louis?

A46. Yes.

Q47. During the years that your orchestra was in existence, did you sometimes play music over the radio?

A47. Yes.

Q48. Over national hook-ups?

A48. Yes.

Q49. I believe you appeared on occasions with the Fitch Band Wagon, did you not?

[fol. 429] A49. Yes.

Mr. Cohen: Will the Court know what Fitch's Band Wagon is?

By Mr. Roberts:

Q50. What is the Fitch Band Wagon program?

A50. The Fitch Band Wagon program is a program sponsored by the F. W. Fitch Company.

Q51. Of Des Moines, Iowa?

A51. Of Des Moines, Iowa, built around different dance orchestras and their histories.

Q52. What can you tell us, Lt. Williams, as to whether your band was known in the trade as a "Name Band"?

A52. There have been times when it has been considered a name band, I imagine; and times when I felt very definitely it was not a name band.

Q53. Well, during the later years, say from 1938 on—

A53. During the year 1938 there were certain times, definitely, when it was not a name band.

Q54. Why do you say that?

A54. Nobody ever heard of it; I could not even get a job.

Q55. You mean the orchestra was unable to secure engagements?

[fol. 430] A55. Yes.

Q56. That was not true in 1940 or 1941, was it?

A56. No.

Q57. Would you say it was a name band during those years?

A57. Well, I think a name band is pretty darned hard—it is a pretty difficult line there; I would say it was better known; I could secure engagements on the strength of its name.

Q58. It was well known in the middlewest, wasn't it?

A58. Yes, it was well-known in the middlewest.

Q59. And pretty well-advertised in the middlewest, wasn't it? A59. Yes.

Q60. You certainly did not regard yourself as a territorial band, did you?

A60. Well, you will have to specify what you mean by a territorial band.

Q61. Well, you did not regard your band as a local band?

A61. No. But nobody in the world—nobody in Atlanta, Georgia, knew what Griff Williams' Band was; very few in New Jersey or down in New York, or in New England. It was well known around the middlewest, and in the west [fol. 431] of course it was well known.

Q62. So that you were—

A62. So in these different periods where we had been broadcasting constantly, we were well known.

Q63. Now, do you recall your orchestra playing an engagement at the Crystal Ballroom in Dubuque, Iowa, in October of 1940?

A63. I know we played two engagements there, October, 1940.

Q64. Yes.

A64. I could not be sure of the date.

Q65. You recall it was in the fall?

A65. Yes, I do.

Q66. And that there was another one in the following year? A66. Yes.

Q67. Say, in September? A67. Yes.

Q68. Of 1941? A68. Yes.

Q69. Incidentally, Dubuque is the same town in which you played one of the ballroom engagements involved in your suit against the United States, is that correct? Do you recall the Melody Mill?

A69. Yes, I guess so. That was in '38.

[fol. 432] Q70. 1938? A70. Yes.

Q71. You played an engagement in the same town, Melody Mill? A71. Right.

(A document was handed to the witness.)

Mr. Roberts: Perhaps we better have the reporter mark that, Lieutenant. Mark that as an exhibit.

(The document produced was marked by the Notary Plaintiffs Exhibit A for Id., F. M. H., and handed to the witness.)

Mr. Roberts: Mark this one.

(The document produced was marked by the Notary Plaintiffs Exhibit B for Id., F. M. H.)

By Mr. Roberts:

Q72. I hand you what the reporter has marked Plaintiffs' Exhibit A, and ask you to examine that document and tell us what it is, if you know?

A72. It is a contract for an engagement at the Crystal Ballroom, October 13, 1940, at the town of Dubuque, Iowa.

Q73. That is a contract for the engagement by your orchestra?

[fol. 433] A73. Griff Williams and His Orchestra.

Q74. Having refreshed your recollection by examining the contract, is the date October 13th the date in 1940 that your engagement was played? A74. I believe so.

Q75. I hand you what the reporter has marked Plaintiffs' Exhibit B (handing document to the witness) and ask you to examine that document and tell us what it is, if you know.

A75. It is a contract for an orchestra under the leadership of Griff Williams.

Q76. What is the date on that contract; that is for the engagement?

A76. For September 1, 1941, to play a performance at Crystal Ballroom in Dubuque, Iowa.

Q77. Do you recall that that is about the time that you played that engagement, October 1st, 1941?

A77. Yes, it was—it was September.

Q78. September 1st, I beg your pardon. I now ask you to examine both contracts and tell us whether they are the same in their provisions.

Mr. Cohen: I object to that question. The contracts speak for themselves.

A78. The contracts are a great deal different. The second contract states the employer employs the personal [fol. 434] services of the employes as musicians severally.

By Mr. Roberts:

Q79. The provisions are not at all alike, are they?

A79. No, they are not.

Q80. When did you first know that the provisions were different?

A80. The minute the new form contract came out.
Q81. Do you recall when that was?
A81. I believe it was in June.
Q82. Of 1941?
A82. I believe so. It became effective then.
Q83. Who told you about it?
A83. I believe they were sent from the union.
Q84. And who is the union?
A84. American Federation of Musicians.
Q85. Were forms sent to you? A85. Yes.
Q86. And some kind of instructions to use that form?
A86. I don't remember what they were, if there were; something I was familiar with.
Q87. At least, you know you were informed by the union to use that form? A87. Right.
[fol. 435] Q88. After June of 1941? A88. Yes.
Q89. That is, in contract engagements? A89. Yes.
Q90. All engagements by your orchestra after June of 1941 were on a form similar—
A90. Yes.
Q91. —to the form shown in Exhibit B?
A91. Yes, sir.
Q92. Do you know who prepared that contract?
A92. No, sir.
Q93. It was not prepared by you? A93. No.
Q94. The contract marked Exhibit A was not prepared by you, either, was it? A94. No, sir.
Q95. You know nothing about how the revisions, the changes, came about between those two contracts, do you?
A95. No.

Mr. Cohen: I object to the series of questions as being leading in character.

By Mr. Roberts:
Q96. Now I hand you, Lt. Williams, both contracts, with [fol. 436] the words in large capital letters, "Music Corporation of America"; do you find them there? (Handing documents to the witness.)
A96. Yes.
Q97. What do they signify?
A97. They are my agents.
Q98. Booking agents? A98. Booking agents.

Mr. Cohen: May I ask, Mr. Roberts, if these questions are for the purpose of identifying the exhibits?

Mr. Roberts: No. It is for the purpose of asking him something about the booking.

Mr. Cohen: The exhibits have not been introduced in evidence yet.

By Mr. Roberts:

Q99. Do you know who filled in the blanks on each of those contracts?

A99. Who filled in the blanks?

Q100. Yes.

Mr. Cohen: That is objected to on the same ground.

The Witness: A100. It is done by the Music Corporation of America.

By Mr. Roberts:

[fol. 437] Q101. Who was your booking agent?

A101. Who were my booking agents.

Q102. Now, when you refer to the Music Corporation of America as your booking agent, just tell us what they did; what it did in that capacity.

A102. They were responsible for securing the engagements for Griff Williams and His Orchestra.

Q103. Did you have an agreement with the Music Corporation of America— A103. Yes.

Q104. —making it your booking agent?

A104. Yes, booking agent.

Q105. That is exclusive? A105. Exclusive.

Q106. Was that agreement oral or written?

A106. Written.

Q107. Do you recall the date it was made?

A107. No, I don't.

Q108. Can you give us an approximate date? That is, by year.

A108. I have been under their management since 1935.

Q109. Down to the time that you were commissioned in the Navy? A109. Yes, sir.

[fol. 438] Q110. Was there just one contract during that entire period? A110. No.

Q111. How many were there? A111. I believe three.

Q112. Were the members of your orchestra parties to any of those contracts? A112. No, sir.

Q113. Now, one of those contracts was in existence during October of 1941, was it not? A113. Yes, sir.

Q114. Was that any different from the booking contract you had with MCA during 1940?

A114. I don't know. Some place along there I signed another contract. I could not tell you the date of that. We can look it up.

Q115. We could find that date from MCA?

A115. We could.

Q116. But you don't know whether or not there was any change?

A116. Some place, I don't know whether it was 1941 or 1942. There was no other.

Q117. Made with MCA?

A117. Right.

Q118. Between you and MCA?

[fol. 439] A118. Right.

Q119. Did the members of your orchestra ever give MCA a power of attorney?

A119. I don't know.

Q120. Do you know? You don't know about that.

(Two documents produced were marked by the Notary, respectively, Plaintiffs' Exhibit C for Id. F.M.H. and Plaintiffs' Exhibit D for Id. F.M.H., and handed to the witness.)

The Witness: Are they both the same?

Mr. Roberts: Practically.

By Mr. Roberts:

Q121. I now hand you what the reporter has marked Plaintiffs' Exhibits C and D, and ask you to examine them and tell us whether or not you have ever seen anything like these documents before?

A121. Yes, I have seen them before. They are press manuals.

Q122. For whose orchestra?

A122. For Griff Williams and His Orchestra.

Q123. Do you know who prepared them?

A123. They were prepared by Music Corporation of America.

Q124. Did you give them the information contained in [fol. 440] these manuals?

Mr. Wilson: I object to that. They have not been put in the record.

The Witness: Do you want me to answer?

Mr. Roberts: At this time I will offer in evidence Plaintiffs' Exhibit C.

Mr. Wilson: To which I will object, on the basis it is immaterial and irrelevant.

Mr. Roberts: The plaintiffs also offer in evidence Plaintiffs' Exhibit D.

Mr. Wilson: The same objections, for the same reasons.

(The said documents, so offered in evidence, marked, respectively, Plaintiffs' Exhibit C for Id. F.M.H. and Plaintiffs' Exhibit D for Id. F.M.H., are attached hereto and made a part hereof.)

By Mr. Roberts:

Q125. Who gave Music Corporation the information contained in these exhibits, Plaintiffs' Exhibits C and D?

A125. They gleaned that from the material I gave them and got it from press releases, and I know that on occasion they got some information from checking with the men in the orchestra.

[fol. 441] Q126. You, of course, did not permit the Music Corporation of America to send out statements that were not true, did you?

A126. Well, I tried not to; but sometimes they would get a story where that was not absolutely the truth, something about diving off the bridge in California, I found once, that I did not do.

Q127. That would be exceptional, wouldn't it?

A127. Well, yes.

Q128. I mean, most of the statements were true ones, though?

A128. Most of the statements were true, yes. They would take a turn that maybe I would blush.

Q129. Are there any other statements in these manuals that you would say were untrue?

A129. I would have to peruse them carefully, to see what was in them.

Q130. I will ask you to look at page 5.

Mr. Wilson: My objection is running to the whole line of questioning.

Mr. Roberts: That is all right.

By Mr. Roberts:

Q130. I show you page 5 of Plaintiffs' Exhibit D (handing document to the witness), and ask you to examine the statements on that page and tell us whether they were [fol. 442] true.

Q130. Yes. But as to—with this reservation; as to statements on "loud music" would apply to engagements in a cafe or hotel, night clubs.

Q131. In other words, the loud-played music was out in a cafe or night club?

A131. Yes.

Q132. The other statements appearing on that page are correct, I believe you stated?

A132. Yes.

Q133. That same page appears in Plaintiffs' Exhibit C as page 5, does it not (handing document to the witness)?

A133. Yes.

Q134. I note page 2 of Exhibit C, and also page 2 of Exhibit D, states: "This band, which recently smashed all records at the world's largest hotel, the Stevens in Chicago, has been a favorite of 'straight' music fans at choice hotels, night clubs, theatres throughout the country, including, among others, the exclusive Aragon and Trianon Ballrooms, Chicago; the Peabody Hotel, Memphis; the Chase Hotel, St. Louis; the Netherland Plaza, Cincinnati; the Banker and Adolphus Hotels, Dallas; Elitch's Gardens, Denver; Palomar and Victor Hugo's in Los Angeles; the [fol. 443] the Schroeder Hotel, Milwaukee; and the Mark Hopkins in San Francisco where they stayed for four years."

What can you tell us as to whether that statement is correct?

A134. We did smash all records at the Stevens Hotel in Chicago.

Q135. You played those other engagements?

A135. And we played these other engagements, and we stayed at the Mark Hopkins in San Francisco for four years, but not in a continuous stretch.

Q136. Do you know when these manuals were prepared?

A136. No, I do not; after 1939.

Q137. Do you find from an examination of page 1 of Plaintiffs' Exhibit C this statement:

"The releases so far made by Griff have been very successful and can be heard on juke boxes throughout America. We believe it is safe to predict the Griff Williams band will be one of the top orchestras for 1942."

What can you tell us as to whether that statement indicates something as to the date when that manual was prepared?

A137. It was probably prepared in 1942.

Q138. Early 1942 or—

[fol. 444] A138. I don't know.

Q139. Or late 1941?

A139. I should guess the early part of '42.

Mr. Wilson: Objection; he is just guessing.

By Mr. Roberts:

Q140. Are you just guessing at that? You know it was after 1939, both of them were prepared?

A140. Yes, sir.

Q141. But you cannot tell the exact date, is that right?

A141. No.

Q142. Now, one more question with reference to these two manuals, Lt. Williams. Who paid for them?

A142. The Music Corporation of America.

Q143. Well, did you reimburse them?

A143. No; not that I know of.

Q144. Your commission covered these manuals?

A144. Yes.

Q145. That is, fees that were coming to your booking agent?

A145. Yes.

Q146. Do you know what these manuals were used for?

A146. They were press manuals sent out in promoting the attraction.

[fol. 445] Q147. Advertising your band, is that right?

A147. Yes.

Q148. In local communities where the band was to appear?

A148. Yes. They were sent to the promoters who might be interested in securing the services of the orchestra.

Q149. They were also used after an engagement was booked, too, weren't they, to advertise stories about the engagement?

A149. For the employers, yes. They were sent to the employers of the orchestra, who would in turn use them in press releases.

Mr. Roberts: I move to strike his references to the employers of the orchestra as a volunteer statement of the witness and a statement of his opinion and conclusion.

By Mr. Roberts:

Q150. The manuals were used for advertising purposes, were they not? A150. Yes, they were.

Q151. For your band? A151. Yes.

(A photograph produced was marked by the reporter as [fol. 446] directed Plaintiffs' Exhibit E for Id. F. M. H.)

By Mr. Roberts:

Q152. I now hand you what the reporter has marked Exhibit E (handing document to the witness), and ask you to examine it and tell us what it is, if you know.

[Q152.] It is a picture of me, of myself.

Q153. Do you know when that picture was taken?

A153. I believe that was—no, I don't; I don't know.

Q154. Was it after 1939?

A154. Yes, it was after '39; it was after 1940.

Q155. What was the picture like this used for, if you know? A155. Display.

Mr. Wilson: We object to it; we object to it going in.

By Mr. Roberts:

Q156. Do you know who prepared this picture?

A156. That particular copy of it?

Q157. Plaintiffs' Exhibit E.

A157. It was prepared by MCA. I had the picture taken and paid the photographer for the original picture.

Q158. That print?

[fol. 447] A158. But that print was made by MCA.

Mr. Roberts: Plaintiffs offer in evidence Plaintiffs' Exhibit E.

Do you object to that?

Mr. Wilson: Yes. The objection is it is immaterial.

(Which said picture, so offered in evidence, marked Plaintiffs' Exhibit E for Id. F. M. H., is attached hereto and returned herewith.)

By Mr. Roberts:

Q159. What were pictures like this print, like this, used for? A159. For display.

Q160. That is, by establishments contracting engagements for your orchestra, is that right?

A160. Yes.

Q161. In the local communities? A161. Yes.

Q162. Where your orchestra appeared?

A162. Yes.

Q163. The print might appear in the front of the ballroom, or somewhere, in advance of the engagement?

A163. That is right.

[fol. 448] (Photographs produced by counsel for plaintiffs were marked by the Notary, respectively, Plaintiffs' Exhibits F, G, H and I, for Id. F.M.H.)

By Mr. Roberts:

Q164. I now hand you what the reporter has marked Plaintiffs' Exhibits F, G, H and I (Handing photographs to the witness), and ask you to examine them and tell us what they are, if you know.

A164. These are publicity photographs of various members connected with our organization, who were further classified as vocal stars, vocalists, featured players.

Q165. When you say "featured player" —

A165. Featured musician.

Q166. What do you mean by that, Lieutenant, "featured musician"?

A166. They were a part of the group of key men. I don't know how to put that. What I mean by featured musicians, they were the stars of the entire organization.

Q167. They sometimes performed solos, did they?

A167. Yes.

Q168. During an engagement?

A168. Both on their instruments and vocally.

Q169. Who told them to do that?

[fol. 449] A169. Well, generally the arrangement was written that way; according to how the musical arrangements were planned, which eventually came under my direction.

Q170. Well, you during the course of the playing of that particular piece, told them when to take a chorus, or something like that?

A170. Not at the moment.

Q171. Did they do that automatically?

A171. Yes, because it was written in the musical arrangement.

Q172. And who secured the musical arrangements?

A172. I did.

Q173. And did you tell the fellow who made the arrangement to make it in that manner?

A173. Not always.

Q174. But many times it was?

A174. Many times.

Q175. Do you know who told these featured musicians to have their pictures taken?

A175. No, I don't. I don't know whether I told them I don't know; or MCA, or sometimes they came up and said, "Here is a picture; can't I get on the Billboard?"

Q176. Well, you may have told them, is that right?

[fol. 450] A176. Could have; but I don't remember actually doing it.

Q177. Plaintiffs' Exhibit F is a picture of Walter King, is that right? A177. Yes.

Q178. And he was a featured vocalist and drummer?

A178. Yes.

Q179. Plaintiffs' Exhibit G is another picture of Walter King, is that right (handing exhibit to the witness)?

A179. Yes.

Q180. And Plaintiffs' Exhibit H is a picture of Julius Herman (handing exhibit to the witness)?

A180. Yes.

Q181. What instrument did he play?

A181. Trombone, and vocalist.

Q182. And Plaintiffs' Exhibit I is a picture of Bob Kirk (handing exhibit to the witness); what was he?

A182. Saxophone, Clarinet and Vocalist.

Q183. Those are the featured players?

A183. Yes.

Q184. And Bob Kirk, Julius Herman, Walter King were members of your orchestra at the time the two engagements we have asked about—

[fol. 451] A184. Yes.

Q185. —at the Crystal Ballroom were played?

A185. Yes.

Mr. Roberts: Plaintiffs now offer in evidence Plaintiffs' Exhibits F, G, H and I.

Mr. Wilson: I will not object to those.

(Which said pictures, so offered in evidence, marked, respectively, Plaintiffs' Exhibits F, G, H and I for Id. F.M.H., are attached hereto and returned herewith.)

By Mr. Roberts:

Q186. Do you know what these pictures were used for?

A186. Display.

Q187. The same purposes as the pictures of yourself, is that correct? A187. Yes.

Q188. That was to advertise and publicise the orchestra, is that right? A188. Yes.

(Two paper instruments, produced by counsel for plaintiffs, were marked by the Notary, respectively, Plaintiffs' Exhibit J for Id. F.M.H. and Plaintiffs' Exhibit K for Id. F.M.H.)

[fol. 452] By Mr. Roberts:

Q189. I hand you now what the reporter has marked Plaintiffs' Exhibit J, and ask you to examine it and tell us what that is, if you know (handing exhibit to the witness)?

A189. That is a mat, sent out to the purchasers for the purpose of publicising Griff Williams and His Orchestra.

Q190. That is, the purchasers of your orchestra's music, is that right? A190. Yes.

Q191. MCA prepared that? A191. Yes.

Q192. I will ask you to look at Plaintiffs' Exhibit K (handing exhibit to the witness); do you find that is another mat?

A192. That is another mat, for a picture of myself.

Q193. Yes. It was also sent out —

A193. Used for publicising.

Q194. As was Plaintiffs' Exhibit J?

A194. Yes.

Q195. Those mats were sometimes printed in a local paper? A195. Yes.

Q196. That was the purpose of that, was it not?

[fol. 453] A196. Yes.

Q197. To publicise the attraction when it came to town?

A197. Yes.

Q198. To play an engagement at some ballroom or some establishment?

A198. They were always sent out by MCA prior to the engagement.

Q199. For publicity purposes? A199. Yes.

Mr. Roberts: Plaintiffs offer in evidence Plaintiffs' Exhibit J and Plaintiffs' Exhibit K.

Mr. Wilson: Objected to as immaterial and irrelevant.

(Which said mats, so offered in evidence, marked, respectively, Plaintiffs' Exhibit J for Id. F.M.H. and Plaintiffs' Exhibit K for Id. F.M.H., are attached hereto and returned herewith.)

By Mr. Roberts:

Q200. Now, Lt. Williams, is there a trade-name for the members of the orchestra, other than the leader, some kind of a name?

A200. You mean they are called side men?

[fol. 454] Q201. That is the customary name, isn't it?

A201. Yes.

Q202. Now, during the years 1940 and 1941, did you have any changes in the personnel of your orchestra?

A202. Yes.

Q203. You had men that had been with the orchestra leaving the organization, and new ones taking their place?

A203. Yes. I don't think there were very many during that period.

Q204. A few, isn't that right?

A204. Probably. I would have to get my records out to be sure.

Q205. You know in the course of a year there would be a few changes?

A205. I have gone periods of a year or better without changing any person.

Q206. They remained constant, is that right?

A206. Right.

Q207. Now, when you did have occasion to make a replacement, did you talk with some prospective musician?

A207. Yes. I would inquire about to see who might fit the vacant chair.

[fol. 455] Q208. Ask him what instrument he played?

A208. Yes.

Q209. Something about his experience?

A209. Tried to find out as much as I could about his experience and his ability, and what he might do, how he might well fit the product we had to offer.

Q210. In a conversation of that sort, did you talk about the matter of his pay?

A210. Yes.

Q211. Then you finally told him he would be all right, or words to that effect?

A211. I would tell him—

Mr. Cohen: I object to the series of questions as being leading in character.

By The Witness:

A211. Well, I would tell him what the general setup was, the type of jobs we were working and generally what they would pay. I never signed a contract with any single man, never had one.

By Mr. Roberts:

Q212. Did you make any kind of an agreement with him when he did become a member of the band?

A212. No further than what the union specifies.

Q213. That is the minimum scale?

[fol. 456] A213. Minimum scale and the two weeks' notice.

Q214. Did you ever pay any of your men more than the union scale?

A214. Well, yes.

Mr. Wilson: I object to this form of question. I will straighten it out on cross-examination. Go ahead.

By Mr. Roberts:

Q215. At the time that you selected one of these men, or talked to him about joining your organization, did you discuss the period that he would be a member?

A215. Only to say, "Well, now, if we get together, let's [staty] together. I don't want to take you into the organization and bulid an entertainment around you if you are not happy here, or if I am not happy with you." But I never committed myself to any particular length of time, nor did anybody commit themselves to a length of time.

Q216. If they came in, it was orally agreed or understood, as long as his services were satisfactory, is that right, they would be a member?

A216. As long as the services were satisfactory and everybody was happy, there would not be any changes.

[fol. 457] Q217. On this matter of pay, did you discuss whether the musicians would be paid daily, or weekly, or monthly; what can you tell us about that?

A217. Well, the union stipulates that. It generally is weekly; and they have to be paid weekly with one-night stands; they are supposed to be paid at the conclusion of the engagement; the union stipulates that.

Q218. Perhaps I misunderstand you. Did you turn money over to these men after every one-night stand?

A218. Many times; often I did. Sometimes, by their own choice, they would say, "Well, I would like to wait a week and give it all to me at once".

Q219. Sometimes you did pay them by the week, though?

A219. Yes. They were always paid by the week on what we called steady engagements.

Q220. That would be engagements, other than one-night stands, is that correct?

A220. Yes.

Q221. I will ask you to examine Plaintiffs' Exhibit B again (handing exhibit to the witness), and tell us how many musicians appeared at that engagement, if you know?

Mr. Wilson: I object. I don't know—

[fol. 458] By The Witness:

A221. I am not sure I know.

Mr. Cohen: Before you answer that, Lieutenant—

The Witness: I could figure it out.

Mr. Cohen: I object to the questions addressed to Exhibit B. It has not been introduced in evidence as yet, as I understand it.

Mr. Roberts: I will offer in evidence Plaintiffs' Exhibit B.

Mr. Cohen: No objection.

(Which said document, so offered in evidence, marked Plaintiffs' Exhibit B for Id. F.M.H., is attached hereto and returned herewith.)

Mr. Roberts: I will also offer in evidence Plaintiffs' Exhibit A.

Mr. Cohen: The Government objects to the admission in evidence of Plaintiffs' Exhibit A on the grounds it is immaterial to the issues in this case.

Mr. Wilson: We also object on the same grounds.

(Which said document, so offered in evidence, marked Plaintiffs' Exhibit A for Id. F.M.H., is attached hereto and [fol. 459] returned herewith.)

By Mr. Roberts:

Q222. Do you know, Lt. Williams, how many musicians were in your orchestra at the time you played the engagement on September 1, 1941, at the Crystal Ballroom?

A222. Twelve men and myself, plus myself.

Q223. What can you tell us as to when the twelve men became members of your orchestra?

A223. As to when they did?

Q224. Yes; with reference to this date of September 1st.

A224. I think I had a girl singer there. Do you want me to include that?

Q225. You may have had a girl singer?

A225. I may have had a girl singer.

Q226. In addition to the twelve musicians?

A226. I am sure I did.

Mr. Roberts: Will you read that question, please?

(The former question as above recorded was read, as follows:

"Q. What can you tell us as to when the twelve men became members of your orchestra?")

[fol. 460] By The Witness:

A226. Most of them became members of my orchestra between February 1st and June 1st of 1939.

By Mr. Roberts:

Q227. In other words, prior to July 26, the date—

A227. Yes.

Q228. —July 26, 1941, the date of the contract?

A228. Yes.

Q229. They had been with you some time?

A229. Yes.

Q230. Now, when a man left your orchestra, did you have occasion to talk with him sometimes?

A230. I don't understand how you mean.

Q231. When some man left your orchestra, did he come to you?

A231. Yes, he came to me.

Q232. What would he say?

A232. [I] would say that, "I want you to give me notice."

Q233. At other times did you have occasion to want to get rid of a man?

A233. Yes.

Q234. What would you do on those occasions?

A234. I would say, "I am sorry, I have to give you your notice".

[fol. 461] Q235. You would tell him, is that right?

A235. Yes.

Q236. And that was true during the year 1941; I mean, that practice?

A236. The custom was; whether I ever used it, I don't know.

Q237. But if a man was—did leave your organization—

A237. Yes.

Q238. —at your request, why, you followed that practice that year, is that right?

A238. Yes.

Q239. Now, when you took in a new man, did you tell him when he was to start to play with the orchestra?

A239. Yes.

Q240. That is, you would name some date?

A240. Yes.

Q241. When he would appear with the orchestra, and you would so inform him, is that right?

A241. Yes.

Q242. Incidentally, who generally determined the number of men in your orchestra?

A242. Generally MCA.

Q243. Your booker?

[fol. 462] A243. Yes. I would always want more.

Q244. You would always want more. Now, on the occasion of the two engagements we have inquired about by your orchestra at the Crystal Ballroom, who picked out the selections of dance music that were played?

A244. Those two engagements?

Q245. Yes.

Mr. Cohen: I object to any questions on this, about engagements in 1940 on the ground it is immaterial and irrelevant to the particular issues in this case.

By The Witness:

A245. Well, I imagine—I picked the groups.

By Mr. Roberts:

Q246. You picked the groups the orchestra played?

A246. Yes.

Q247. And that was true with respect to each engagement, is that correct?

A247. Yes.

Mr. Wilson: The objection runs to the whole line.

Mr. Roberts: That is all right.

By Mr. Roberts:

Q248. These selections were taken from some kind of a [fol. 463] musical library? A248. Yes.

Q249. Who did the library belong to, Lieutenant?

A249. My property.

Q250. Your personal property?

A250. Yes.

Q251. I presume that it contained arrangements of popular numbers?

A251. Yes.

Q252. Past and present, probably?

A252. Right.

Q253. Those are the arrangements that you selected from somewhere?

A253. Yes.

Q254. I suppose you paid somebody to prepare the arrangements?

A254. Right.

Q255. And then they were placed in the library?

A255. Yes, that is right.

Q256. You mentioned the groups. Did you have some order in which the selections were played?

A256. Well, often the manager would come up and say, "Now, mix them up; don't play all waltzes", so I would give them some waltzes, several times during the evening, and play some fast and some slow ones. It was up to me to [fol. 464] please the people.

Q257. Do you recall that Mr. Bartels ever told you that?

A257. Yes; he must have.

Q258. "He must have", or do you know definitely?

A258. If you ask me the hour and the minute, I don't know it.

Q259. He might have?

A259. He probably did. As a matter of fact, it was my custom to come up and say, "Have you got any suggestions? Do they like what we are doing"?

Q260. Have you any recollection that Mr. Bartels told you to play certain pieces?

A260. I believe I have.

Q261. What did he say to you?

A261. "Mix them up, Griff."

Q262. Who told you that?

A262. Bartels did.

Q263. Roy?

A263. Roy Bartels, yes. You would go up to the manager and say, "What do they like?"

Q264. That is, the dancers?

A264. Yes; "What do they want to hear?" You would also ask him when he wants the band to take intermission.

[fol. 465] Mr. Roberts: I move to strike the last statement as a volunteer statement of the witness, and not in response to any question.

The Witness: All right, excuse me.

By Mr. Roberts:

Q265. Now you had certain instrumentation in your orchestra, of course.

A265. Yes.

Q266. Did you decide that?

A266. Yes.

Q267. That is, the planning of the instruments?

A267. Yes.

Q268. What instruments should be used. Now, did you on the occasion of each of these two engagements of the Crystal Ballroom attempt to have your orchestra play what might be termed a distinctive style of music?

A268. Insofar as our arrangements were distinctive, yes.

Q269. Well, you did try to have some kind of distinctive style, didn't you?

A269. Yes.

Q270. Something to that effect in these publicity manuals, isn't there?

A270. Yes.

[fol. 466] Q271. And you determined your instrumentation with that in mind, didn't you?

A271. Yes.

Q272. And you did that, isn't that correct?

A272. Yes.

Q273. And you had previously, I believe, as you have testified here, selected the musicians that you thought would follow the type of music you would produce?

A273. Right.

Q274. And of course you attempted to secure arrangements—

A274. Yes.

Q275. —which would permit the orchestra to play that distinctive type of music you wanted to produce; and that was true on both engagements, was it not?

A275. Yes.

Q276. That you tried to develop a distinctive type of music, or type of music?

A276. Band music, fundamentally.

Q277. Pardon?

A277. Yes.

Q278. Did your orchestra have a theme song?

A278. Yes.

[fol. 467] Q279. Did you pick that?

A279. I wrote it.

Q280. You wrote it. I suppose that was played at the beginning and end of each engagement?

A280. It was played at the beginning of each engagement. It was played—It was interspersed in the arrangements throughout the evening.

Q281. Throughout the evening. And you worked that out for the orchestra, is that right?

A281. Yes.

Q282. Now, I observe on Plaintiffs' Exhibit E that you have something in your hand in that picture.

A282. Yes.

Q283. What is that?

A283. That is a baton.

Q284. What is a baton used for?

A284. A baton is used in conducting an orchestra.

Q285. Who conducted the orchestra on the occasion of each of these engagements?

A285. I did.

Q286. At Crystal Ballroom?

A286. I did.

Q287. That is the engagement on October 13, 1940?

A287. Yes.

Q288. And the engagement on September 1, 1941?

[fol. 468] A288. Yes.

Q289. And in using the baton, did you direct the musicians in the manner in which they should play?

Mr. Cohen: I object to that question as being leading.

Mr. Wilson: It calls for a conclusion.

Mr. Cohen: So far as it is concerned with anything other than the September 1st, 1941, I object as being immaterial to the issues in this case, and also as being immaterial to the issues in this case and not the best evidence of the manner in which they performed, inasmuch as the contract speaks for itself.

By The Witness:

A289. I tried to. They did not always do what I told them to.

By Mr. Roberts:

Q290. That is what you were doing up there with the baton, isn't that right?

A290. Yes.

Q291. Now, sometimes you sat at the piano, is that right?

A291. Yes.

Q292. Because you play the piano yourself?

A292. Yes.

[fol. 469] Q293. Who determined the tempo of the orchestra?

A293. I did.

Q294. And how was that done, Lieutenant?

A294. Well, as we started each group, I would beat the tempo off with my feet; as we started each number I beat it then with my feet, "1, 2" (illustrating).

Mr. Roberts: I wish we could get that in the record.

By Mr. Roberts:

Q295. If you sat at the piano, I suppose you did it a little differently?

A295. Usually I would just play my own introduction on the tempo.

Q296. Some kind of "plunk, plunk" on the piano, I suppose?

A296. Yes.

Q297. In other words, that tells the orchestra when to begin?

A297. Yes.

Q298. Is that right? I suppose you tell them when to stop?

A298. I never said, "Stop".

Q299. But you gave them some kind of a stop?

A299. When there were no more notes on the page, [fol. 470] they stopped.

Mr. Wilson: All together?

The Witness: It is to be hoped.

By Mr. Roberts:

Q300. Then you stopped leading, too, didn't you?

A300. Yes.

Q301. Now, the orchestra sometimes played loud?

A301. Yes.

Q302. During a piece?

A302. Yes.

Q303. And sometimes soft?

A303. Yes.

Q304. And you had some way of indicating that?

A304. Yes.

Q305. How is that done?

A305. By means of the hand, or vocally, I would say, "Give it"! or, "s-s-s-s-s-s-s". Of course, it was generally written in the music, how, to indicate it.

Q306. But that is how you would do these things you just described, is that right?

A306. Yes.

Q307. You also mentioned you had some featured members?

A307. Yes.

Q308. When a musician would take a solo on his in- [fol. 471] strument, or would stand up, is that right?

A308. When we had featured numbers, they were a planned part of a small floor show, part of a presentation.

Q309. Was that planned ahead of time?

A309. Yes.

Q310. Who determined that? That is, the actual execution of the featured number?

A310. Who determined it to be played?

Q311. No.

A311. Who planned what was to be presented?

Q312. Yes.

A312. I did.

Q313. Did your orchestra have any rehearsals before it appeared at Crystal Ballroom for the engagement of September 1, 1941?

A313. Not for that particular engagement.

Q314. You had had some earlier, or prior to that time during the year, hadn't you?

A314. Oh, yes.

Q315. You had rehearsed from time to time, hadn't you?

A315. Certainly.

Q316. Who told your musicians when there was going to be a rehearsal?

[fol. 472] A316. I did, generally.

Q317. Did you tell them where the rehearsal would take place?

A317. Generally. It does not always hold true.

Q318. But generally it would be true?

A318. Generally.

Q319. At these rehearsals, did you make suggestions as to how the instruments should be played?

A319. Yes.

Q320. Working out some chords, I suppose, and harmonies?

A320. Yes.

Q321. You would attempt to make suggestions as to the production of certain musical effects, is that right?

A321. Correct.

Q322. And you would try the piece over to accomplish those effects?

A322. Right.

Q323. And that was under your direction?

A323. Yes, it was.

Q324. What can you tell us, Lt. Williams, as to whether, in order to achieve these musical effects, the members of your orchestra would have to have a certain seating arrangement on the bandstand; was that necessary?

[fol. 473] A324. It was because of the microphones.

Q325. Who determined where the musicians would sit?

A325. I did.

Q326. You told them about that. Incidentally, did you carry a portable microphone system?

A326. Yes.

Q327. A portable address system?

A327. Yes; at times.

Q328. Well, at these one-night stands?

A328. Not always.

Q329. Do you recall whether you did during 1941?

A329. No.

Q330. You don't remember that?

A330. I don't remember.

Q331. Who owned the address system, when you did carry it?

A331. When we did carry it?

Q332. Yes.

A332. It was mine.

Q333. It was your own personal property?

A333. That is right.

Q334. Now, do you recall at the time of the engagement on September 1, 1941, at the Crystal Ballroom, did your side men have uniforms on?

[fol. 474] A334. I think so.

Q335. Then they were dressed uniformly, is that right?

A335. Yes.

Q336. That was true of the engagement in October of 1940?

A336. I think so.

Q337. Who picked out the uniforms?

A337. We had a committee within the orchestra itself.

Q338. Did they secure your approval or consent?

A338. Yes.

Q339. Did you make any suggestions about them?

A339. Probably.

Q340. You told them how to sit—that is, the sitting arrangements on October 1, 1941, at the Crystal Ballroom?

A340. Yes, I did.

Q341. Now, when your orchestra appeared for these engagements, of course it had to be transported there, didn't it? A341. Yes.

Q342. Can you tell us who arranged for the transportation of the orchestra on each occasion?

[fol. 475] A342. Yes, sir; I did.

Q343. You did?

A343. Generally I did.

Q344. You did for both of these engagements, is that correct?

A344. As far as I know.

Mr. Wilson: That is objected to, the arrangement of October, 1940. I object to any question directed to that.

By Mr. Roberts:

Q345. So far as you know, you arranged for the transportation of the orchestra at Dubuque on each occasion?

A345. Yes, I know that I did in September, 1941, and it is possible that the Music Corporation of America did it the year before.

Q346. Who paid the money to the transportation agency? A346. I did.

Q347. Do you recall who told the members of the orchestra where to report after they got to Dubuque?

A347. After they got to Dubuque?

Q348. Yes.

A348. I did.

Q349. Did you tell them the time?

[fol. 476] A349. Yes.

Q350. That was true of the engagement of October 13, 1940? A350. Yes.

Q351. And September 1, 1941?

A351. Yes.

Q352. Now, I note from a recital in the contract marked Plaintiffs' Exhibit B, that the price agreed upon was $350 guaranty, with a privilege—with a 60 percent privilege, of the gross receipts.

A352. Yes.

Q353. You also find mention of a $125 deposit.

A353. Yes.

Q354. In the contract?

A354. Yes.

Q355. To whom was that paid, if you know?

A355. The Music Corporation of America.

Q356. Did the Music Corporation of America take its commission out of that amount?

A356. I don't remember.

Q357. What was ordinarily true where they receive commission?

A357. Generally so. I mean, after finishing up, say that was a tour or engagement, then the first thing, the auditor of the Music Corporation and myself would go into a huddle [fol. 477] and we would find out how much they owed me and how much I owed them—

Q358. You would have an accounting?

A358. We would have an accounting, yes.

Q359. And any surplus they paid over to you at that time?

A359. Yes; and sometimes there were made deposits on commissions.

Q360. And you would owe them?

A360. And I would owe them.

Q361. That happened in 1940 and 1941?

A361. What do you mean?

Q362. That practice with the auditor?

A362. Yes.

Q363. In other words, you carried an account with MCA, didn't you?

A363. Yes.

Q364. Do you find from an examination of Plaintiffs' Exhibit A that the contract price for that engagement was $300, with a privilege of 60 percent of gross receipts, guarantee?

Mr. Wilson: I am going to object to that question.

By The Witness:

A364: Yes.

[fol. 478] By Mr. Roberts:

Q365. And was there a deposit fee in the case of that engagement?

Mr. Wilson: I object.

By The Witness:

A365. Yes.

By Mr. Roberts:

Q366. $150? A366. Yes.

Q367. And that was paid to MCA?

A367. Yes.

Q368. And credited to your account?

A368. Yes.

Q369. On MCA's books?

A369. Yes.

Q370. Now, in the case of the engagement of October 13, 1940, to whom was the balance of the contract price paid?

A370. To myself.

Q371. And was that also true of the balance of the contract price in the case of the engagement of September 1, 1941? A371. Yes.

Q372. Do you recall whether these payments were made in cash or by check?

[fol. 479] A372. I believe they were made in cash.

Q373. On each occasion? A373. I think so.

Q374. Of course, your men received some money for services in playing each of these engagements, did they not? A374. Yes.

Q375. What was the medium of payment to them?

A375. Generally cash.

Q376. Generally cash. Sometimes though you used check? A376. Yes.

Q377. Whose check was that? A377. Mine.

Q378. On your account? A378. Yes.

Q379. And the amount which you paid them, whether it was by check or in cash, was the amount previously agreed to pay them when they became members of your orchestra, is that right?

Mr. Cohen: I object to that question as being leading.

By The Witness:

A379. Not always. The men there were given agreements for that one night.

[fol. 480] By Mr. Roberts:

Q380. You mean they received a different amount every night? A380. In many cases.

Q381. In many cases they did not, though, didn't they?

A381. What?

Q382. In many cases they didn't, too, didn't they?

A382. Yes, in many cases they did not. That is nothing—there was no set rule on that.

Q383. Didn't they receive some kind of a fixed amount?

A383. The union scale would vary from that at different places for one night.

Q384. I believe you said you paid over the union scale.

A384. In places.

Q385. Did you in 1941?

Mr. Wilson: I object to the conclusion he paid above the union scale, that Mr. Williams paid above the union scale.

By The Witness:

A385. There were times that the men were paid over union scale in 1941, yes.

By Mr. Roberts:

[fol. 481] Q386. And you determined that?

A386. Usually I did.

Q387. So that the amount that was paid them was the amount that you had determined, isn't that right?

A387. Yes.

Q388. And that was true whether you paid them by check or by cash, wasn't it? A388. Yes.

Q389. Where did you pay them? A389. Where?

Q390. Yes.

Mr. Cohen: I object.

By The Witness:

A390. It might have been any place.

Mr. Cohen: I object to this series of questions unless it is limited to the engagement of September 1, 1941, on the

ground that it is confusing, and it is immaterial to the issues in this case what was done between Mr. Williams and the side men on any other occasion.

By Mr. Roberts:

Q391. I asked, Mr. Williams, do you have any way of determining whether during the week of September 1, [fol. 482] 1941, you paid the men by check or by cash?

A391. Yes, I do. I have records on it.

Q392. You do? A392. Yes.

Q393. And you cannot tell now, from your own recollection, how they were paid that week, can you?

A393. No. I believe the two engagements were paid at the same time. The one at Sioux City, Iowa, and the Crystal Ballroom I think were paid at the same time.

Q394. You think now that they were paid by check?

A394. I believe so.

Q395. And that was a check on your account?

A395. Yes.

Q396. And then when you say the two engagements, you mean one engagement at the Crystal Ballroom on September 1, 1941 — A396. Yes.

Q397. — and the other engagement, some other ballroom in Sioux City — A397. Yes.

Q398. — which happened to be played that same week?

A398. The same week.

[fol. 483] Q399. Now, I presume that the proceeds of the engagements varied from week to week, did they? That is, during 1940 and 1941; the take of the orchestra varied, didn't it?

A399. When you are doing one night stands, yes.

Q400. Yes. Some weeks it was more, and other weeks it was less? A400. Yes.

Q401. After the expenses were paid, such as commission and MCA, and the transportation expense, and any other charges, possibly advertising, and then after the side men were paid was there sometimes something left?

A401. Yes.

Q402. And who received that? A402. I did.

Mr. Wilson: I am going to object to that question; it is confusing and I think it embraces a good number of questions, talking about paying for advertising, and so on. We don't know who paid for advertising.

By Mr. Roberts:

Q403. Well, your orchestra had some expenses, didn't they? A403. Travelling, yes.

[fol. 484] Q404. And that was true in the case of the engagement of September 1, 1941, was it not?

A404. Yes, there were expenses.

Q405. After the payment of these expenses and the side men — A405. Yes.

Q406. — some money remained, is that true?

A406. Yes.

Q407. Can you tell from the amount — the price for that engagement, whether there was something remained after that one? A407. I believe so.

Q408. And you received that, is that right?

A408. Yes.

Q409. Now, were there ever occasions when the take was not enough to pay these expenses?

Mr. Cohen: I object to that question as calling for an answer on matters which are not in issue in this case and, therefore, immaterial.

Mr. Wilson: The same objection.

By The Witness:

A409. Well, yes. But there was always enough to supply the union scale for everybody around, including myself.

[fol. 485] By Mr. Roberts:

Q410. Didn't you ever take a loss on an engagement?

A410. Yes, I have.

Q411. Who stood the loss? A411. I had to.

Q412. Is that true in 1941?

A412. I don't know.

Q413. You cannot tell without looking at your books?

A413. Yes.

Q414. But that was the practice. If there was a loss, you stood it, isn't that right? A414. Yes.

Q415. In fact, you had a loss at one time, in the Victor Hugo Hotel?

Mr. Wilson: I object. It is immaterial. I object to the whole line of questioning.

By The Witness:

A415. Not below the union scale.

By Mr. Roberts:

Q416. You took a beating in that case, didn't you?

A416. I didn't do very well, no.

Q417. I mean, Lieutenant, you so testified in this other suit?

[fol. 486] A417. Yes.

Q418. Now I notice that in each of the contracts, that is, the one marked Plaintiffs' Exhibit A and Plaintiffs' Exhibit B, there is a reference to "Sixty percent privilege". A418. Yes.

Q419. Will you just tell us what that means?

A419. Well, that means if 60 percent of the gross receipts were more than the guaranty, he has the privilege of the excess of the stated $350.

Q420. That is, in the case of the engagement of September 1, 1941?

A420. That is right. I could exercise the privilege of taking 60 percent of the gross receipts, rather than the $350, flat price, for the engagement.

Q421. And if you did exercise that privilege, did your side men receive more money for the evening's engagement? A421. Generally.

Q422. Not always though, is that right?

A422. I don't remember.

Mr. Wilson: I object to that.

By Mr. Roberts:

Q423. You don't remember about that?

[fol. 487] A423. No.

Mr. Wilson: Stick to the particular engagement involved.

By Mr. Roberts:

Q424. As a matter of fact, do you know whether you got into the privilege on either one of these engagements at Crystal Ballroom?

A424. Well, I don't think so.

Q425. Were you during the year 1940 a member in good standing in the American Federation of Musicians?

A425. Yes.

Q426. And were you also such a member during the year 1941? A426. Yes.

Q427. And were the side men of the orchestra during 1940 and 1941? A427. Yes.

Q428. Members in good standing? A428. Yes.

Q429. Of the American Federation of Musicians? A429. Yes.

Q430. I will ask you one further question regarding Plaintiffs' Exhibit B (handing exhibit to the witness). Calling your attention to the form on that contract, is that [fol. 488] agreement known as the American Federation of Musicians Form B contract, if you know?

A430. Yes, it is. Can we go back to that Victor Hugo discussion? I didn't come out with a loss, but I didn't make what I intended to make on it; I didn't make enough for a good living.

Q431. Didn't you testify in your other suit you took a beating?

A431. I did. It was because I did not make what I intended to make on it.

Q432. Would anything happen to you, so far as your membership in the American Federation of Musicians is concerned, had you used some other form of contract than Form B? A432. I don't know.

Mr. Wilson: I object.

By Mr. Roberts:

Q433. You don't know? A433. I don't know.

Q434. Do you know whether your by-laws required you after June 1, 1941, to use Form B?

Mr. Wilson: I object. They speak for themselves.

By the Witness:

[fol. 489] A434. I don't know.

By Mr. Roberts:

Q435. You don't know. What can you tell us, Lieutenant—and this is probably one of the last questions, believe it or not—was there any difference between these two engagements by your orchestra, at Crystal Ballroom, so far as you know, other than the Form B contract?

A435. In the execution of them?

Mr. Wilson: I object.

By Mr. Roberts:

Q436. Yes. That is, the actual playing of them.

Mr. Wilson: I object.

By the Witness:

A436. Very little.

By Mr. Roberts:

Q437. They were the same, weren't they?

A437. Fundamentally so.

Mr. Roberts: Fundamentally the same. I have no more direct examination.

(At the hour of 11:40 o'clock a. m., September 21, 1944, a recess was taken to 1:00 o'clock p. m. of the same day, September 21, 1944.)

[fol. 490]

Great Lakes Station,
September 21, 1944,
1:00 o'clock p. m.

Met pursuant to recess.

Present: Mr. Roberts.
Mr. Cohen.
Mr. Wilson.

And thereupon the following further proceedings were had herein:—

GRIFFITH E. WILLIAMS, a witness heretofore called and sworn on behalf of the plaintiffs, resumed the stand and further testified as follows:

Direct Examination (Ctd.)

By Mr. Roberts:

Q438. Lieutenant, did you testify in your suit against the United States as follows:

"Q. You spoke of taking a beating at the Victor Hugo. As I understand, they got into financial difficulty there. You sustained some loss in that engagement, did you not?

"A. Yes.

"Q. But for the time that you played you paid your men, did you not?

[fol. 491] "A. I had to."

Did you so testify in that case?

19-13,124-25-27.

A438. I believe I did. But, "sustaining a loss" I was wrong there because I did not sustain an actual loss because the union won't even allow you to; but I did not make what I intended to make.

Q439. But you did want to convey that you had to pay your men on account of union regulations, is that right?

A439. I wanted to convey—I took a beating.

Q440. As a matter of fact—

A440. I had to pay my men, yes, according to what the union specified I had to pay them.

Q441. And that was true in 1941, was it not?

A441. Yes.

Q442. During all that year?

A442. Yes; I had to pay the men what the union set as the minimum.

Mr. Roberts: Well, that is all.

Cross-Examination.

By Mr. Wilson:

Q443. At this engagement you say you took a loss. What was the name of that place?

A443. The Victor Hugo.

[fol. 492] Q444. The Victor Hugo. That was played in what year? A444. 1938.

Q445. That was in 1938?

Mr. Cohen: To clear the record on that, if I may at this point, Mr. Wilson, I would like to ask:

By Mr. Cohen:

Q446. Did you refer then to the year 1938 as the time you had to pay your men, regardless of what you got from the purchaser of the music? A446. I can't—

Q447. Do I understand correctly, that when you answered Mr. Roberts that you sustained a loss, inasmuch as you had to pay your men union wages, regardless of the income you derived from your engagement at the Victor Hugo, you were referring to the year 1938?

A447. At any time you would have to pay—

By Mr. Wilson:

Q448. In this particular instance?

A448. In that particular instance, yes; yes.

By Mr. Cohen:

Q449. You were referring to 1938? A449. Yes.

[fol. 493] By Mr. Wilson:

Q450. In your contract with the Victor Hugo, who furnished the muesic; was it a contract similar to this which you have identified as Form B contract? A450. No.

Q451. And which is in the record as Exhibit B?

A451. No.

Q452. It was not according to this? A452. No.

Q453. Now, you said on direct examination that there were oftentimes when the personnel of your orchestra has been changed; is that correct? A453. Yes.

Q454. Now then, the personal changes and a new musician joins the orchestra; is he guaranteed by you that he will receive any set wage whether the orchestra plays or not? A454. No, he is not.

Q455. You haven't any agreement with any members of the orchestra, pursuant to which they receive any wages from you in the event that the orchestra is not playing any engagement? A455. Never.

Q456. In other words, the only time the men receive any compensation whatsoever is—

[fol. 494] A456. When they work.

Q457. —when they work. That is, when the orchestra plays an engagement?

A457. They receive compensation.

Q458. They receive compensation?

A458. But I never had an agreement further than that.

Q459. Have you ever guaranteed any of them that they would be paid a certain amount of money for an engagement?

A459. On a specific engagement, yes.

Q460. On a specific engagement? A460. Yes.

Q461. You assumed the responsibility of them receiving the money, is that correct? A461. Yes.

Q462. Now, were you guaranteed any set amount of money on any engagement? A462. Yes.

Q463. Did you ever play an engagement in which you were not guaranteed a certain amount of money?

A463. No.

Q464. What is the minimum amount of money that you were guaranteed on every engagement?

A464. The minimum has been always been the scale [fol. 495] for all—union scale for all members concerned, plus any transportation expenses incurred while getting there.

Q465. In other words, you were always guaranteed union scale? A465. Always.

Q466. Does that vary in different parts of the country? A466. Yes.

Q467. And if the union scale in Chicago happens to be $10 a night for the leader, are you always guaranteed $10 a night? A467. Yes.

Q468. Is that over and above any commission that you might be obligated to pay MCA? A468. Yes.

Q469. And any travelling expenses? A469. Yes.

Q470. In other words, you are guaranteed, the union scale goes to you for the work performed, over and above all expenses? A470. Right.

Q471. Do you advise the establishment in which the music is furnished the amount of travelling expenses— [fol. 496] A471. Generally, yes.

Q472. —accrued when you go? A472. Yes.

Q473. And you at no time have guaranteed any wage or salary to any side man as a regular income? A473. No.

Q474. And will their salary, waige, vary according to the union scale in different localities around the country? A474. Yes, it has.

Q475. And they can get $50 a week in some places and seventy in another? A475. Yes.

Q476. To make the record clear: The commission for MCA is figured over and above union scale then? A476. For myself and the orchestra, yes.

Q477. Yes. In other words, if you do not get— you get union scale. If you get no more than union scale, then you do not pay more than ten percent to MCA? A477. That is right.

Q478. There were certain pictures submitted here in the record. Did you pay for any of these? A478. No.

Q479. Did you pay for any of the publicity for the [fol. 497] orchestra? A479. No.

Q480. Who pays for that, do you know? A480. The different operators.

Q481. The different operators?

A481. MCA put out those particular pictures, and they sent the different operators or promoters mats and the press booking, and then the promoters themselves pay the expense of having the ads printed in the paper.

Q482. Who were the Williams Warblers?

A482. The Williams Warblers were a trio of singers.

Q483. In your orchestra?

A483. Yes. They were sometimes a quartet.

Q484. And sometimes a quartet. Were they otherwise?

A484. Jules Herman; Herman was then in the Warblers.

Q485. Was Walter King in it? A485. Yes.

Q486. Jules Herman, you say? A486. Yes.

Q487. Was Griff Williams in it? A487. No.

Q488. Walter King? A488. No.

[fol. 498] Q489. And Bob Kirk?

A489. No.

Q490. You say that there had been some changes in the personnel of your orchestra at times. Were any of the members of the orchestra obligated to remain with you?

A490. Not past their usual two weeks' notice.

Q491. What is the two weeks' notice?

A491. That is a stipulation made by the union, a regulation that should I like to make a change, I should give a man two weeks' notice, and if he would like to leave the organization he would say, "I am giving you two weeks' notice." You could not hold him past that.

Q492. You had no contract with any—

A492. Not other than that.

Q492. —on the side which would compel them to remain in the orchestra?

A493. No.

Q494. Now, did the side men receive any daily or weekly or monthly wage?

A494. Any what?

Q495. Daily, weekly or monthly wage?

A495. On a steady engagement they received a weekly wage.

[fol. 499] Q496. On a steady engagement a weekly wage?

A496. Yes.

Q497. If you were playing steady engagements, they would earn their money in the orchestra?

A497. As we went along.

Q498. When you said on direct testimony that you had taken a loss, what did you mean by that?

A498. I meant I hadn't made what I hoped to make.

Q499. But you did make union scale?

A499. Yes.

Q500. In other words, you hoped to make over and above union scale on such contracts as the one at Crystal Ballroom, which provided for gross?

A500. Yes.

Q501. And if the gross did not come up to expectations, you received only scale?

A501. That is right.

Q502. In other words, you considered that a loss?

A502. I did, because that was hardly enough to live on.

Q503. Were all members of your orchestra members of the American Federation of Musicians?

A503. Yes.

Q504. At all times?

A504. Yes.

[fol. 500] Q505. Since you organized them?

A505. Yes.

Q506. Now, when you played an engagement, such as the one played at the Crystal Ballroom on September 1st of 1941, would you ask the manager just what he wanted you to do?

A506. Yes; I would always meet him before we started the engagement and ask him what the crowd liked, what types of music.

Q507. What types of music his patrons liked, is that right?

A507. Yes.

Q508. And what he wanted you to play to entertain his patrons?

A508. If he had anything he wanted in there, he would tell me.

Q509. You wanted to find out if he had any instructions he wanted in particular, is that correct?

A509. Yes.

Mr. Roberts: I object to this as putting the words in the witness' mouth, and contrary to what he [testifed] in the previous question, and broader than the previous question. May that objection precede the previous question?

Mr. Wilson: Yes.

[fol. 501] By Mr. Wilson:

Q510. Has the operator of an establishment ever told you you would have to play loud?

A510. Well—

Mr. Roberts: Objected to as irrelevant and immaterial.

By The Witness:

A510. Yes.

By Mr. Wilson:

Q511. And has he requested that you play softer?

A511. Yes, many times.

Q512. You have complied with the requests?

A512. Yes.

Q513. For members of the orchestra to make a living, is it necessary that they have a compact group who have rehearsed together and who have played together?

Mr. Roberts: Objected to as calling for a conclusion of the witness.

By The Witness:

A513. You say for an orchestra to make a living is it necessary—

By Mr. Wilson:

Q514. For members of an orchestra to make a living, is it necessary for them to rehearse together in a regular, [fol. 502] compact group?

A514. I should say yes.

Q515. That is, to reach any amount of success?

A515. Yes. I don't see how they could—

Q516. Because of the peculiar nature of the business?

A516. It depends on what you call a living. In order to forge ahead and be a successful orchestra, they have to be a well-organized group and well-rehearsed.

Q517. Well-rehearsed. And they have to have a leader, is that correct?

A517. Correct.

Q518. You are fairly familiar with orchestras, having been in them, is that true?

A518. Yes.

Q519. For a good many years?

A519. That is right.

Q520. Does the name you present who identifies that orchestra always lead the orchestra?

A520. According to how you mean, "lead".

Q521. Stand up in front with a baton.

A521. There are some that stand up in front with a baton follow the orchestra.

Q522. And there are some that stand out in front of the [fol. 503] orchestra?

A522. That is right.

Q523. And someone else starts the orchestra?

A523. There is someone who knows what it is about in back doing the actual leading.

Q524. So the person whose name identifies an orchestra does not necessarily lead the orchestra at all times?

A524. There are cases when they do not, that is true.

Q525. Are you familiar with Glen Gray's Orchestra?

A525. Yes.

Q526. Does he stand up in front with a baton, do you know? A526. No.

Q527. He plays an instrument in the orchestra?

A527. I believe he does.

Q528. At the Crystal Ballroom, this engagement on September 1, 1941, who arranged the bandstand where the orchestra is to sit?

A528. You mean in the room?

Q529. In the room.

A529. The manager.

Q530. He places it?

A530. Bartel, Bill says, "Well, here is the bandstand." [fol. 504] Q531. And that is where you have got to play from, is that correct?

A531. Yes.

Q532. If he thought the music would sound better from the middle of the floor, do you think you could take your orchestra to the middle of the floor and play?

A532. Not if he said "no".

Q533. Now, you say that you arranged the transportation?

A533. Yes.

Q534. For the orchestra?

A534. Yes.

Q535. And with the price of the job booked always includes that cost?

A535. Yes.

Q536. So that you would be assured the scale over and above the transportation cost?

A536. Sometimes the price of the job depended on that.

Q537. But you and the men always had to be guaranteed scale? A537. Yes.

Q538. Mr. Williams, I notice that on this Form B con- [fol. 505] tract that is in the record as Exhibit B, your name is absent; is that correct?

A538. Yes.

Q539. I notice on the back of the contract there are spaces for names of employees, local number, social security number and wages. I notice that is blank also.

A539. That is correct.

Q540. On the face of the contract there is a place which says, "Accepted", and under that, in parentheses, "(Orchestra Leader)", which on this exhibit is blank also.

A540. That is right.

Q541. Is it customary, for your engagements under contracts of this type, to leave those places blank?

A541. No.

Q542. Could you explain how they happen to be blank in this instance?

A542. Well, I was on my way from Denver to the Palmer House in Chicago and played these engagements, the three of them, enroute, and evidently they did not know where to send the contracts for my signature, and so it was signed by Jim Breyley, Music Corporation.

Q543. When you say they did not know where to send [fol. 506] it, do you mean the Music Corporation of America?

A543. Well, they might have known where but not have known where it would catch up with me; I don't know. I mean, I just never got them and they were not signed. Generally they are signed. Generally there is a list of the men on the back, and often the union comes up and checks with you to make sure.

Q544. After your engagement at the Crystal Ballroom on September 1, 1941, where did the orchestra go then?

A544. To the Palmer House.

Q545. In Chicago?

A545. Right.

Q546. How long did you play there?

A546. I think it was twenty-one weeks.

Q547. Was there a Form B contract executed at the Palmer House?

A547. Yes.

Mr. Roberts: This is objected to as irrelevant and immaterial, not pertaining to any events material to this case. May that objection stand throughout?

Mr. Wilson: Yes.

[fol. 507] By Mr. Wilson:

Q548. Did you sign that form of contract?

A548. Yes.

Q549. Were the names of members of the orchestra—were the names of employees, local number and security number and wages listed on the back?

Mr. Roberts: Objected to as not the best evidence.

By The Witness:

A549. Yes.

By Mr. Wilson:

Q550. At the Palmer House were you told where and how to seat the men on the stand? A550. Yes.

Mr. Roberts: May we have an objection? May the objection stand to the line of testimony relating to any inquiries respecting the witness' engagements at the Palmer House subsequent to the last engagement he played at the Crystal Ballroom? May that stand, as irrelevant and immaterial?

Mr. Wilson: You can make it broader than that. All engagements played subsequent to—you may want some in.

Mr. Roberts: Objected to as irrelevant and immaterial, [fol. 508] and not pertaining to any issue in this case, and not proper cross examination.

By Mr. Wilson:

Q551. Now, at the Palmer House were you told where and how to seat the men? A551. Yes.

Q552. Who told you where and how to seat them?

A552. Miss Abbott.

Q553. Who is Miss Abbott?
A553. She is a producer of the Empire Room.
Q554. Producer for the —
A554. For all entertainment in the Empire Room.
Q555. At the Palmer House? A555. Yes.
Q556. Did the Palmer House have you—compel you to have any special rehearsals?
A556. Yes, for the floor show.
Q557. When did they have your rehearse?
A557. We always had to be there four days before we started an engagement to rehearse there. At times there were changes in the show, or at times they wanted to add another act or something, and they would call a rehearsal.
Q558. Were your men paid for these rehearsals?
A558. Yes, we were.
[fol. 509] Q559. Would they tell you the time they wanted you to rehearse? A559. Yes.
Q560. And the place, too, that they wanted you to rehearse? A560. Yes.
Q561. Did they tell you when to make intermissions?
A561. Yes.
Q562. Did they tell you where the men were to go during intermissions? A562. Yes.
Q563. Did they allow the men to mingle with the guests? A563. No.
Q564. Were you permitted to? A564. Yes.
Q565. Did you act as master of ceremonies?
A565. Yes.
Q566. They told you what duties to perform as such?
A566. Yes.
Q567. Did they specify the type of music that they wished played? A567. Yes.
Q568. How many times did you play at the Palmer House since September 1 of 1941?
[fol. 510] A568. Three extended engagements.
Q569. Will you tell the approximate duration of each of the three?
A569. Well, the first one was twenty-one weeks; the second one was nineteen weeks, and the third one forty-four weeks. I think that is right.
Q570. And in each of these engagements the same is true about telling you where to sit? A570. Yes.
Q571. And about sitting and rehearsals, and so forth?

A571. Yes.

Q572. Now, did you play at any other hotels in and around the country? A572. Yes.

Q573. What hotels since September 1, 1941?

A573. The Chase Hotel of St. Louis; the Baker Hotel in Dallas; Copely-Plaza Hotel in Boston.

Q574. The Plaza in Cincinnati?

A574. No, — yes, that is all right; that is 1941.

Q575. Generally—and in your engagements with these hotels, did you use Form B contracts? A575. Yes.

Q576. That was executed between you and the hotels? [fol. 511] A576. That is right.

Q577. And did you sign the contract?

A577. Yes.

Q578. And you always were named, and the members of the orchestra?

Mr. Roberts: Objected to as not the best evidence. May that precede the answers? I intended to introduce the objection first.

Mr. Wilson: Yes.

By The Witness:

A578. Yes.

By Mr. Wilson:

Q579. And their local number, social security number and wage?

Mr. Roberts: The same objection. May that be shown ahead of the answer?

Mr. Wilson: Yes.

By The Witness:

A579. Yes.

By Mr. Wilson:

Q580. Now, at each of these hotels —

Mr. Wilson: I am trying to shorten this so that you can catch your train. I would like that to show in the record, too.

Mr. Roberts: Surely.

[fol. 512] By Mr. Wilson:

Q580. (Continuing) Did they tell you and the orchestra when to rehearse?

Mr. Roberts: Just a moment. I will shorten this, too. May we have a standing objection to this line of inquiry as to engagements by Griff Williams and His Orchestra after September 1, 1941, at hotels mentioned, on the ground that the questions and the testimony sought to be elicited are irrelevant and immaterial to any issue and they are not an issue in this case, and not proper cross examination. That may stand?

Mr. Wilson: Yes.

By Mr. Wilson:

Q581. Did the hotels generally tell you when to rehearse? A581. Yes.

Q582. And call a rehearsal? A582. Yes.

Q583. And control the conduct of the men?

A583. Yes.

Q584. And they told the men where they would have to go during the intermissions? A584. Right.

[fol. 513] Q585. And they directed you when you were to take intermissions? A585. Yes.

Q586. Did they also tell you how long to play any group numbers before an intermission? A586. Yes.

Q587. And generally exercised the same controls that were exercised at the Palmer House you testified to previously? A587. Yes.

Q588. Did they furnish loud speaker instruments?

A588. Yes.

Q589. They usually furnished music racks?

A589. Yes.

Q590. Furnish a piano? A590. Yes.

Q591. And the other instruments the men furnished themselves? A591. Yes.

Q592. And they owned and controlled the premises on which the services were performed? A592. Yes.

Q593. You had nothing to say about the arrangement of the bandstand and where to play?

A593. And where I played?

[fol. 514] Q594. Yes. I mean, you could not ask them to locate your orchestra in some other part of the hotel, could you?

A594. I could ask them; but they did not have to do it.

Q595. Or have the stand arranged at a different place in a particular room in which you were playing?

A595. Yes; but they have never done it.

Q596. They had full control over that, is that right?

A596. Yes.

Q597. Did the managers of these hotels give you instructions just what was expected of you and the orchestra?

A597. Yes.

Q598. Did they require uniformity of dress?

A598. Yes.

Q599. Did they tell you the type of clothes to wear?

A599. Yes, most times. You would naturally wear tuxedoes for a formal occasion. If you did not wear what you were expected to, you would soon hear of it.

Q600. Did they regulate the deportment and conduct of [fol. 515] the members of the orchestra?

A600. Yes.

Q601. Did you play any music at these hotels which was copyrighted? A601. Yes.

Q602. And a license was needed for it? A602. Yes.

Q603. Did you procure the license to play it?

A603. No.

Q604. Who procured the license?

A604. The hotel.

Q605. For the engagement played at the Cyrstal Ballroom on September 1, 1941, did you play any music that was copyrighted? A605. Yes.

Q606. Did you procure the license for that music?

A606. No.

Q607. Who procured that license?

A607. I assume the Crystal Ballroom.

Q608. Playing for these hotels, did you broadcast over the radio at all? A608. Yes.

Q609. Did they tell you when you were to broadcast?

A609. Yes.

[fol. 516] Q610. The length of time you were to broadcast? A610. Yes.

Q611. Did they require that the broadcast be submitted in advance of the broadcast?

A611. Yes; to this broadcasting station.

Q612. They required you to submit it to the broadcasting station? A612. Yes.

Q613. And did they require you to play a different type of music during the dinner hour than played during the supper hour? A613. On occasions.

Q614. On occasions? A614. Yes, sir.

Q615. Did they require you to act as master of ceremonies? I believe you testified on that. A615. Yes.

Q616. Did you have anything to do about the hiring of the floor shows? A616. No.

Q617. Did you play with the floor shows, accompany the floor shows?

A617. Yes. At the Palmer House they expected us to do that, one of our own.

Q618. At the Palmer House, did they instruct you to [fol. 517] put on one of your own?

A618. Yes, one called a little show, put on with the orchestra. At the Chase at St. Louis they would expect the orchestra to do something as a part of the floor show.

Q619. And they would ask you to do that?

A619. Yes.

Q620. Did they tell you the time at which the orchestra was to play? A620. Yes.

Q621. Start to play, and so on? A621. Yes.

Q622. Now, aside from playing in hotels during the period from September 1, 1941, to the time you went in the Navy, did you play in any theatres? A622. Yes.

Q623. What theatres?

A623. The Chicago Theatre; Orpheum Theatre in Madison, Wisconsin.

Q624. Who arranged the shows you were to put on in the theatres?

A624. Well, that varied. Generally, I mean, if you were going into a town like Madison, we arrived at eleven o'clock in the morning, and you had some acts probably to [fol. 518] rehearse, and you go and call the manager and draw up a program and after the first show you would see how it worked out at the time, and what the audience reaction was, and if it needed changing we would change it.

Q625. When you say "we", who do you mean?

A625. The management and myself.

Q626. The management would consider it with you?

A626. Right; and we worked it out.

Mr. Roberts: May we have the same objection on all this line of examination on the theatres as we had to the hotels? That is, after September 1, 1941.

Mr. Wilson: Yes.

By Mr. Wilson:

Q627. At places like the Chicago Theatre—

A627. At places like the Chicago Theatre, before we ever started our engagement, the management and I would sit down and work out a program.

Q628. The management would call you in and work out a program. And were you strictly scheduled on all these programs?

A628. Every one scheduled for time, and how much we could do and what acts might be built around the show.

Q629. Now, with the theatres, did you execute the [fol. 519] same type of contract— A629. Yes.

Q630. —that is in the record under Exhibit B?

A630. Yes.

Q631. No difference in the wording? A631. No.

Q632. The only difference being that you would have signed it, and the names of the orchestra would appear there on the back, with the other information?

Mr. Roberts: Objected to as leading and immaterial.

By the Witness:

A632. Yes. There is a theatre contract (indicating). It looks just about the same.

By Mr. Wilson:

Q633. Now, besides the hotels and theatres, did you play any other engagements?

A633. Yes. I played some ballrooms.

Q634. Were they similar to the Crystal Ballroom?

A634. The same idea.

Q635. Were those engagements played under the same type of contract? A635. Yes.

Q636. Except that they were signed by you?

[fol. 520] A636. Yes.

Q637. And the names of the orchestra— A637. Yes.

Mr. Roberts: Objected to as not the best evidence.

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Vol. II

TRANSCRIPT OF RECORD

(Pages 381 to 714)

Supreme Court of the United States

OCTOBER TERM, 1946

No. 731

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, D.B.A. CRYSTAL BALLROOM, PETITIONERS,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, GRIFF WILLIAMS, ET AL.

No. 732

LARRY V. GEER AND MARGARET GEER, D.B.A. LARRY GEER BALLROOMS, PETITIONERS,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 29, 1946.

CERTIORARI GRANTED JANUARY 6, 1947.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 13,124.

CIVIL.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

APPELLANT,

vs.

ROY BARTELS, ED BARTELS, CARL BARTELS, AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 7, 1945.

No. 13,125.

CIVIL.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

APPELLANT,

vs.

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 7, 1945.

No. 13,127.

CIVIL.

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS,

APPELLANTS,

vs.

ROY BARTELS, ED BARTELS, CARL BARTELS, AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 10, 1945.

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By Mr. Wilson:

Q638. —and other information appearing on the back?

A638. Yes.

Q639. And on all the other engagements?

A639. Yes, as far as I know.

Q640. Now, when you played any engagements at ballrooms, did you have any special rehearsals? A640. No—

Q641. You would have no special rehearsals?

A641. No, not unless the ballroom had some special—I don't know that the ballroom ever did—but on any first-nighters I had to have special rehearsals for the special bills that the management appeared in; that has happened.

Q642. The management has asked you to have that special rehearsal? A642. Yes.

Q643. Have the men been paid for that special rehearsal?

[fol. 521] A643. I don't remember.

Q644. You don't remember whether they had to be included in that?

A644. It might be possibly included in the union scale already.

Q645. Now, on these engagements at ballrooms, you would be told when to take intermissions?

Mr. Roberts: Objected to as irrelevant and immaterial, not bearing upon any issue in this case.

Mr. Wilson: You can run that line along.

Mr. Roberts: Yes. As to any other question as to any ballroom other than the Crystal Ballroom.

By the Witsness:

A645. Yes.

By Mr. Wilson:

Q646. And they would tell the men where to go during the intermissions? A646. In the ballrooms —

Q647. When I say "where to go"—

A647. Not usually.

Q648. Location in the ballrooms.

A648. Not usually, no.

Q649. In ballrooms did they, more or less, encourage [fol. 522] the men to mingle with their patrons during the intermissions?

A649. They didn't make it a point; but they made it a point not to.

Q650. In hotels they made it a point not to?

A650. Yes.

Q651. The operation was a bit different?

A651. Quite different.

Q652. In the means of control, that is actually exercised by the signator to the Form B contract?

A652. Yes.

Q653. In other words, the hotels exercise a greater amount of control, and the ballrooms do not think so much of that side? A653. Right.

Q654. And did these ballrooms tell your just what hours you were to play?

Mr. Roberts: Objected to as not the best evidence.

By the Witness:

A654. It is their contract.

By Mr. Wilson:

Q655. It is all arranged?

A655. It is stated; it is stated on the contract.

Q656. Now, the Music Corporation of America is your [fol. 523] agent, you say? A656. Yes.

Q657. For booking your engagements? A657. Yes.

Q658. I cannot make out this signature on this exhibit. Who is this (indicating)? A658. Jim Breyley.

Q659. Who is he?

A659. He is one of the heads of the Music Corporation of America.

Q660. He signed this contract? A660. Yes.

Q661. Now, at the engagement of September 1st, 1941, played at the Crystal Ballroom, did you refuse at any time during that engagement to comply with any request made by the manager of the Crystal Ballroom concerning the detailed manner of rendering music at the Ballroom?

Mr. Roberts: Objected to as assuming conditions not in evidence. May the objection precede his answer?

Mr. Wilson: Yes.

By the Witness:
A661. No.

By Mr. Wilson:
[fol. 524] Q662. During the engagement of September 1st, 1941, had the manager of the Crystal Ballroom requested the discharge of a particular member of the orchestra, would you have felt yourself legally obligated to have discharged that member of the orchestra?
A662. Yes.

Mr. Roberts: I object as calling for a conclusion of the witness, and a self-serving declaration.

By Mr. Wilson:
Q663. The answer was— A663. Yes.
Q664. Are there such things as featured members in an orchestra? A664. Yes, featured.
Q665. You call them featured members? A665. Yes.
Q666. Just who would you say were the featured members of your orchestra?
A666. The vocalists, Bob Kirk, Walter King, Jules Herman; the saxophone man named Joe Porretta. I may include one more.
Q667. Who would that be?
A667. The trombone man, Ernie Gibbs.
[fol. 525] Q668. They were more or less featured men?
A668. They were featured key men.
Q669. Will you define what a name band is?
A669. It is pretty hard—it is pretty hard to make any definition stick. I suppose it is a band that has qualified itself to work a long engagement at a well known establishment.
Q670. Are there nationally known name bands and local name bands? A670. Yes, yes.
Q671. And then there are some bands who are much better known than other bands, is that right? A671. Yes.
Q672. Some are known in certain sections and not in others?
A672. That is right.
Q673. It is all a matter of degree?
A673. It is a matter of degree.
Q674. And geography, both? A674. Yes.

Q675. Did I ask you on the cross-examination whether you had been told on occasions to cut down the volume of your band? A675. Yes.

Q676. And you have done it?

[fol. 526] A676. Yes, I have done it.

Q677. On this engagement played at Crystal Ballroom on September 1, 1941, did you consider yourself legally obligated to comply with any request made by the management of the establishment concerning the manner and the detailed way in which you should render the music?

Mr. Roberts: Objected to as a self-serving declaration, and irrelevant and immaterial.

By The Witness:

A677. Yes.

By Mr. Wilson:

Q678. Who are the Williams Warblers?

A678. I answered that.

Q679. Would you consider them featured men in your orchestra?

A679. Yes.

Q680. Did you name them?

A680. Yes, I did. Did I name them?

Q681. Yes.

A681. No, I don't think I did say.

Mr. Roberts: You had some funny names in it.

The Witness: I said there was only one man in that group.

[fol. 527] By Mr. Wilson:

Q682. Well, would you name them?

A682. Yes. Jules Herman, Bob Lispsky, Bruce Yantis and Charley Gaylord. Leave out Bob Lispsky. He was a member of them for a while. Put in Rounie Conrad.

Q683. Now, would you consider Yantis, Gaylord and Conrad featured members of the orchestra, in addition to the ones named before?

A683. Yes.

Q684. You testified on direct examination that you would inform a new man when he was to appear and when he was to commence playing.

A684. Yes.

Q685. You would tell him to what establishment he was to go?

A685. They generally knew.

Q686. He generally knew?

A686. Sure. I would give him the date and say, "We will start on a Monday night."

Q687. In other words, you say, "We will start on a Monday night" at such and such a place, naming the establishment?

A687. Yes.

Q688. Now, did you generally tell all the members of [fol. 528] the orchestra where the next engagement was and what time they were to be there, to start playing?

A688. Yes.

Q689. And that would be true for all of them?

A689. Yes, sure.

Q690. Not particularly a new man. Has the orchestra ever been requested by the establishment to wear a particular type of uniform?

A690. Yes.

Q691. Did they comply with that request?

A691. Yes.

Q692. You do not recall whether you were asked to wear a particular type of uniform for an engagement—

A692. No.

Q693. —at the Crystal Ballroom the 1st of September, 1941? Probably not?

A693. Probably not.

Q694. You played these one-night engagements before?

A694. Yes.

Q695. And they are just sort of an accepted dress?

A695. Yes; unless they specify differently. I have had to play an engagement where all the band has had to play in baby clothes; that has happened.

[fol. 529] Q697. That has happened?

A697. Yes.

Q697. And then you dressed in baby clothes when requested?

A697. Yes.

Q698. Exhibit B provides a $350 guarantee. Is that $350 sufficient to pay for the transportation, union scale for yourself and all members of the orchestra?

A698. Yes.

Q699. Do you recall whether you told the manager of the Crystal Ballroom how much of that $350 was for transportation?

A699. I don't remember.

Q700. Did you generally tell the manager of the establishments how much was for transportation?

A700. Sometimes; not always; whenever they asked.

Q701. Now, when an engagement is played, is the amount provided for on the contract paid over to you?

A701. That that has not been deposited, yes.

Q702. That which has not been deposited?

A702. Yes.

Q703. With MCA?

A703. Yes.

Q704. Then do you distribute it to the members of the [fol. 530] orchestra?

Mr. Roberts: Objected to as calling for a conclusion of the witness, and very leading.

By The Witness:

A704. Yes.

By Mr. Wilson:

Q705. In executing Form B contracts, for engagements to be played pursuant to Form B contract, was it your intention to give full control over to the services to the establishment?

Mr. Roberts: Objected to as calling for a self-serving declaration.

By The Witness:

A705. If they wanted it.

By Mr. Wilson:

Q706. Was it your intention to give them the right of control?

A706. Yes.

Q707. And you consider, under this particular contract in the record, Exhibit B—

A707. Yes.

Q708. —as having, through your agent, Music Corporation of America, given the same control, the same right to control?

Mr. Roberts: The same objections.

[fol. 531] By The Witness:

A708. Yes.

Cross-Examination.

By Mr. Cohen:

Q709. Mr. Williams, I call your attention to Plaintiffs' Exhibit B, and I ask you whether at the time you executed this you were a member of the American Federation of Musicians?

A709. I was.

Q710. All the men who played with Griff Williams and His Orchestra were also members of the American Federation of Musicians?

A710. They were.

Q711. I believe you stated on direct examination that the union prescribed this form of contract, is that correct?

A711. Yes.

Q712. Now, did you understand the terms of the contract at that time?

A712. Yes.

Q713. You understood that there was a departure from the previous contract?

A713. Definitely.

Q714. Now, did you understand that this form of con-[fol. 532] tract purported to make the ballroom the employer, both of yourself and of the side men in the orchestra?

Mr. Roberts: Objected to as calling for the opinion as conclusion of the witness, and for a legal conclusion.

By The Witness:

A714. The answer is, yes.

By Mr. Cohen:

Q715. Was it your understanding that the relationship of employer and employee would be created, with the Crystal Ballroom as the employer, is that right?

Mr. Roberts: The same objection, and immaterial and irrelevant, and the witness not shown competent.

By The Witness:

A715. Yes.

By Mr. Cohen:

Q716. Now, at the time this contract was presented to the Crystal Ballroom, was it presented by you or by someone acting in your behalf?

A716. By someone acting in my behalf.

Q717. And that was the Music Corporation of America?

A717. Yes.

Q718. And the Music Corporation of America was authorized by you to enter into a contractual arrangement [fol. 533] for the employment of musicians, is that correct?

A718. Yes.

Q719. Now, are you able to state whether the side men authorized you to engage the Music Corporation of America to negotiate this contract?

A719. I had this contract with the Music Corporation of America before I had any of these particular side men with me.

Q720. Now, when the particular side men came into the aggregation to play or to sing, what was the understanding between you and the side men at that time?

A720. The side men knew that we were an MCA organization to start with.

Q721. Did they know that MCA was the exclusive booking agent? A721. Yes.

Q722. For the organization? A722. Yes.

Q723. Now, did any of the side men ever object to the use of MCA booking agency?

A723. No. Sometimes they used to complain about MCA, "Why don't they get us better jobs?", "or money?"

Q724. Now, can you state whether Roy Bartels, or any [fol. 534] other one of the plaintiffs, doing business as Crystal Ballroom, made known to you or to your agent, any objection to signing this contract?

A724. Please state that again.

Mr. Cohen: Will you read the question?

(The pending question as above recorded was read by the Notary.)

By The Witness:

A724. No.

By Mr. Cohen:

Q725. In other words, they never objected to entering into the Form B contract, is that right?

A725. No.

Mr. Roberts: Objected to as to that, the witness not being shown competent and contrary to the evidence, he having already testified to executing a contract and that the witness had no dealings with the Bartels.

By Mr. Cohen:

Q726. During the engagement at Crystal Ballroom, did any of the plaintiffs ever take issue with any of the terms of the contract?

A726. No.

Q727. So far as you know?

A727. No.

[fol. 535] Q728. During the engagement, or afterwards, did Roy Bartels, or any of the plaintiffs, ever state to you, or to any agent of yours, that the terms of the contract did not represent the agreement between you and the Crystal Ballroom?

A728. No.

Q729. Now, do you understand, Lt. Williams, that this contract, Plaintiffs' Exhibit B, embodies the entire transaction between you and the Crystal Ballroom?

A729. Yes.

Q730. You have read Plaintiffs' Exhibit B, haven't you?

A730. Yes.

Q731. And you agree with the terms of Plaintiffs' Exhibit B representing the arrangement which you entered into, both in your own behalf and as agent for the side men for this engagement on September 1, 1941, is that correct?

A731. Yes.

Q732. Now, were there any terms agreed upon between you and the Crystal Ballroom, or between any agent acting in your behalf, and the Crystal Ballroom, which are at variance with any of the terms of this contract?

[fol. 536] A732. No.

Q733. Then you understand that in representing the side men in your orchestra, you were acting as the agent for the Crystal Ballroom?

Mr. Roberts: Objected to as calling for the opinion and conclusion of the witness. May that objection precede the answer?

Mr. Cohen: Yes.

By The Witness:

A733. Yes.

By Mr. Cohen:

Q734. I believe you testified that you guaranteed the members of your orchestra a certain wage. Now, do I understand correctly, that this guaranty was only for this one engagement on September 1, 1941?

A734. I did not guarantee any wage for them on the engagement, outside of the union scale.

Q735. Is it true then that you understood that the guaranty would cover the union scale for yourself and the side men?

Mr. Roberts: I object as having been asked and answered.

Mr. Cohen: Let me finish that question.

By Mr. Cohen:

Q736. Do I understand correctly, that in stating that [fol. 537] you guaranteed that the side men would receive the union scale, you were merely stating your understanding that, under this contract of September 1st, 1941, engagement, a sufficient remuneration was agreed upon so that both you and the side men would receive at least the union scale?

Mr. Roberts: Objected to as a confusion question and calling for the opinion and conclusion of the witness, and contrary to the facts already in evidence.

By The Witness:

A736. Yes.

By Mr. Cohen:

Q737. Isn't it true, Mr. Williams, that during this period, that is, in September, 1941, you were not obligated to pay your side men any definite wage or salary; is that correct?

A737. Outside of the union scale.

Q738. And isn't it true that you were obligated to pay them the union scale only when they played?

A738. Right.

Q739. Now, these men in your orchestra, Mr. Kirk, Mr. King, Mr. Herman, are they well known in the music profession? A739. They were.

[fol. 538] Q740. At the time of this engagement, September 1, 1941, were they?

A740. I would say they were.

Q741. And they all played at the Crystal Ballroom?

A741. Yes.

Q742. Do you know whether you held yourself out as leader of the orchestra as being able to bring with you as participants in the engagement these particular men?

A742. They were expected to be there, yes.

Q743. Was that understanding conveyed to the Crystal Ballroom? A743. So far as I know.

Q744. And in your advertisements? A744. Yes.

Q745. Now, during the engagement at the Crystal Ballroom on September 1, 1941, was any one or more of the plaintiffs in attendance at the ballroom?

A745. I know Mr. Bartels was there.

Q746. Mr. Roy Bartels? A746. Yes.

Q747. Now, either before or during the engagement, did Mr. Bartels give you any order or request which you refused to obey? A747. No.

[fol. 539] Q748. I believe on direct examination you testified, did you not, that he did suggest or request that you play a certain type of music, to the extent of mixing up your numbers, is that correct? A748. Yes.

Q749. And you complied with that direction?

A749. Yes.

Q750. I believe you referred several times in the course of your examination to your orchestra, or "my orchestra". Just what did you mean by that?

A750. Well, I was the leader and owner of the name, of course. It was not a corporation. It was our organization.

Q751. You were the member who stood in front of the band and wielded the baton? A751. Yes.

Q752. Or directed from the keyboard, is that correct?

A752. Yes.

Q753. Now, is it correct in stating that mutual notices were exchanged, when the relationship between you and the side men terminated, that you meant merely that their association with the aggregation would terminate, and their use of you as a leader for the particular band would cease, is that correct?

[fol. 540] A753. That is right.

Q754. How long have you been a member of the American Federation of Musicians?

A754. I think since 1929, or '8 — '9.

Q755. Are you acquainted with the rules and regulations of the union? A755. Fairly well.

Q756. Are you able to state whether any rules, laws and regulations of the union would interfere with the assumption by you to your side men of the relationship of employes to the Crystal Ballroom for this particular engagement?

Mr. Roberts: Objected to as calling for a legal opinion and conclusion of the witness, the witness not being shown competent.

By The Witness:

A756. Not to my knowledge.

By Mr. Cohen:

Q757. At any rate, it was your understanding at the time that you were entering into such a relationship, is that correct?

Mr. Roberts: Objected to as irrelevant and immaterial.

By The Witness:

A757. That is correct.

[fol. 541] By Mr. Cohen:

Q758. I believe you stated on direct examination that you played substantially the same during the engagement of September 1, 1941, as on a previous occasion when you played at the Crystal Ballroom?

A758. The same type of music.

Q759. Is that what you meant, the same type of music?

A759. Yes.

Q760. Now, on the second occasion, do you feel that your relationship to the ballroom was any different from what it was on the previous engagement?

Mr. Roberts: Objected to as irrelevant and immaterial?

By The Witness:

A760. Not outside of the forms of the contract.

Mr. Roberts: I withdraw the objection.

By Mr. Cohen:

Q761. Did you feel that you were—when you say, "not outside of the terms of the contract," Lt. Williams, do you mean that whereas previously if you acted in pursuance of the terms of the contract, you would not be subject to the control of the Crystal Ballroom, on September 1, 1941; acting pursuant to the terms of the contract you were sub-
[fol. 542] ject to that control; is that what you mean?

Mr. Roberts: Objected to as being confusing.

Mr. Cohen: Strike that question, please; it is confusing.

Read the last answer of the witness.

(The last answer as above recorded was read by the Notary, as follows:

"A. Not outside of the forms of the contract.")

By Mr. Cohen:

Q762. What do you mean by that?

A762. There is no difference in the actual operation of that—with the new contracts; if Bartels wanted to exercise more control, or any type of control over us he could have.

Mr. Cohen: No further questions.

Mr. Wilson: I have a couple of questions I want to put in there.

Recross Examination.

By Mr. Wilson:

Q763. Were minimum wages for yourself and for the side men for each engagement determined by the union scale in existence in the various localities in which you played?

[fol. 543] A763. Right.

Q764. And the minimum wage for the engagement on September 1, 1941 —

A764. Yes.

Q765. —for the engagement at the Crystal Ballroom was determined how?

A765. By the union, the local union of Dubuque, Iowa.

Q766. By the local union of Dubuque, Iowa?

A766. Yes.

Q767. In other words, they established the minimum wage scale?

A767. They established the minimum wage scale.

Q768. And not you? A768. And not me.

Q769. Did the Crystal Ballroom, prior to your playing there on September 1, 1941, request the names and identities of the members of your orchestra?

A769. Not that I know of.

Q770. They did not come to you and ask for the names?

A770. No.

Q771. And you did not volunteer them? A771. No.

Q772. Now, you spoke of guaranteeing the wages to the [fol. 544] side men. I think that ought to be explained for the record. Did you guarantee to your side men that they would receive a certain specified amount of money over a certain period of time; or did you merely state that they would receive a certain amount of money for a particular engagement?

Mr. Roberts: Objected to as having already been asked and answered.

By The Witness:

A772. As of a particular engagement, they received a certain amount of money.

By Mr. Wilson:

Q773. You were not obligated by any contract or any arrangement with any member of your orchestra, that the union scale or any other amount be paid any member of the orchestra?

Mr. Roberts: Objected to as already having been asked and answered at least ten times in this record, the witness having stated again and again that he guaranteed the minimum union scale.

By The Witness:

A773. I always guaranteed—it was understood that they would get the union scale.

By Mr. Wilson:

[fol. 545] Q774. If a particular establishment breached its contract and did not pay the contract price, were you obligated to pay it?

A774. No. I think I would take them down to the union and have the union fight it.

Q775. Is that all regulated by the union rules and regulations?

A775. Yes. That has happened many times, where the union collected for an engagement where they were unpaid.

Mr. Wilson: Those are all of the questions.

Redirect Examination.

By Mr. Roberts:

Q776. But unless you always collected from the establishment enough to pay them, you would have to pay them?

A776. No. I don't think the union has failed to pay them.

Q777. Where it has not been collected from the establishment, were you not obligated to pay the men?

A777. No, not that I know of.

Q778. There may have been such cases, though?

A778. I doubt it; I don't know.

[fol. 546] Q779. You don't remember?

Mr. Wilson: I object to that except as it relates to this case.

By Mr. Roberts:

Q780. You don't know, do you?

A780. No, I don't.

Q781. Are you sure?

Mr. Wilson: I was going to object.

By Mr. Roberts:

Q782. Now, you mentioned that you understood the engagement of September 1, 1941, as being covered by the terms of the Form B contract.

A782. Yes.

Q783. You stated that on the cross-examination.

A783. Yes.

Q784. And you know, don't you, having stated that you read the terms, that the by-laws are made a part of the contract?

A784. Yes.

Q785. So that the engagement was also subject to the by-laws which were a part of this contract?

Mr. Wilson: I object. The contract speaks for itself.

By Mr. Roberts:

Q785. (Continuing) Is that correct?

[fol. 547] A785. Yes.

Q786. Now, you mentioned early in your cross-examination that the proceeds from some engagements did not come up to your expectations?

A786. Yes.

Q787. By that you mean they were not profitable to you, don't you?

A787. Yes.

Q788. In other words, you personally would have received more money had they been profitable, is that right?

A788. Yes.

Q789. Now, you have had considerable testimony on these featured members.

A789. Yes.

Q790. Just to have the record straight, you decide about who should be featured members, don't you?

A790. Yes.

Q791. When there were changes in the Warblers, for example, you determined that, didn't you?

A791. Yes.

Q792. One other thing, just to clear it up. You mentioned the promoter paid for advertising.

A792. Correct.

Q793. On occasions, that is, advertising in the papers?

[fol. 548] A793. Yes.

Q794. The advertising is in the local papers, isn't it?

A794. Yes.

Q795. You don't intend to convey the impression he paid for this photograph of yourself and the orchestra, and the publicity manuals which have been offered in evidence?

A795. No. He paid for distribution.

Q796. If the mats were published in the papers, who paid for that?

A796. He paid; he would pay for the poster.

Q797. The MCA paid for this publicity matter that has been introduced in evidence?

A797. Yes.

Q798: As a matter of fact, Lt. Williams, except for the form of the contract, there was not one iota difference between your second engagement and your first engagement, was there, in the Crystal Ballroom?

Mr. Wilson: I object to that.

By the Witness:

A798. Not much, as I remember.

By Mr. Roberts:

[fol. 549] Q799. It was just the same way you operate?

A799. As far as I remember.

Q800. The contract was the only thing now that was different, isn't that right?

Mr. Cohen: I object.

Mr. Wilson: I object.

Mr. Cohen: The question has been asked and answered.

By Mr. Roberts:

Q800. (Continuing) Isn't that right?

A800. Fundamentally the same.

Q801. You mentioned a number of hotels gave you some directions which you described, with reference to the intermission, and so forth. Did the hotels at which you played during the year 1938 give you some directions?

A801. The same—not always; the same type.

Q802. The same type? A802. Probably, yes.

Q803. They told you where to take your engagements?

A803. Yes. Each hotel is a different picture in the story. I mean, some have regulations on one thing that does not apply.

Q804. The practice you described during 1941 after September, that often happened in 1938, too, didn't it?

[fol. 550] A804. Probably.

Q805. That is, instructions from the hotel people to mingle with the guests or not?

A805. It did on some occasions.

Q806. In 1938? A806. Yes.

Q807. You also had rehearsals then in 1938, didn't you?

A807. Yes.

Q808. At the direction of the hotels? A808. Yes.

Q809. And sometimes rehearsals were independent acts; that is, floor shows? A809. Yes.

Mr. Roberts: I believe that is all.

Recross Examination.

By Mr. Wilson:

Q810. One more point in the record, to make it absolutely clear and certain; it is probably repetitious. But I would like to ask Lt. Williams if, subsequent to June of 1941 when the Form B contract came into use, were all your contracts—were all the contracts between the orches-
[fol. 551] tra and the establishment signed by you and filled out completely on the back, except this particular one on September 1, 1941?

Mr. Roberts: Objected to, not the best evidence.

By the Witness:

A810. The great majority of them, but I cannot truthfully state all.

By Mr. Wilson:

Q811. Can you recall any others that were not filled out?

A811. No.

Recross Examination.

By Mr. Cohen:

Q812. Mr. Williams, do I understand you correctly, you understood that you would operate the same, under—for this particular engagement on September 1, 1941, as you would for engagements which were contracted for on other Form B contracts, despite the fact that by and through some oversight, or some other reason, the names of the particular musicians were omitted, is that correct?

A812. Yes, that is right.

Mr. Roberts: I believe that is all.

[fol. 552] Mr. Wilson: No further questions.

(Deposition closed.)

The reading of his foregoing fully transcribed deposition and the signing thereof by the said witness, Griffith E. Williams, were, by stipulation by and between counsel for the respective parties present at the taking of said deposition, and by the witness, duly waived:

(Seal) (Signed) FRANK M. HARKER,
Notary Public, Cook County, Illinois.
My Commission expires Feb. 25, 1946.

The printed documents, photographs and paper exhibits heretofore marked for identification as Plaintiffs' Exhibits A through and including K for identification, and so offered in evidence by counsel for plaintiffs, are attached hereto and are in words and figures following, to-wit:—

138

MUSIC CORPORATION OF AMERICA

REPRESENTING

No. 1279 CO

SEPTEMBER 14, 1940 RP:MS

GRIFF WILLIAMS AND HIS ORCHESTRA
(Attraction)

(Number of artists or musicians)

The undersigned employer engages the attraction above named and attraction agrees to perform upon the following terms:

Date(s) of engagement OCTOBER 13, 1940

Place of engagement CRYSTAL BALLROOM

Street Address ..... City and State DUBUQUE, IOWA

HOURS AND SPECIAL INSTRUCTIONS:

Attraction agrees to play or perform for three consecutive hours (with usual intermissions) beginning at 9:00 P. M. Standard Time at place of engagement, unless otherwise herein provided. PLACE OF ENGAGEMENT MUST BE SPECIFIED

DEPOSIT TO BE MADE BY MONEY ORDER, BANK DRAFT OR CASHIERS CHECK.

HOURS: 9 P.M. to 1 A.M. o'clock

"Management, MUSIC CORPORATION OF AMERICA"

Must appear in all announcements and advertising matter of employer wherever the name of the attraction is used. PRIVILEGE SIXTY PERCENT OF GROSS RECEIPTS, GUARANTEE

Price agreed upon $ $00.00

Deposit $ 150.00 (Certified Check, Money Order, or Bank Draft)

Balance to be paid in United States currency to Attraction Leader or Music Corporation of America, on its demand before 10:00 P. M. on date of engagement, or earlier on his or its demand.

Received 150.00
7-16 19
M. C. A. by

Overtime Charge

It is agreed that all the laws, rules, and regulations of the American Federation of Musicians are a part of this contract. Employer agrees to pay the difference, if any, between the compensation herein provided and a sum equal to five (5%) per cent over the Federation scale in effect. Terms of resale of attraction by Employer must comply with regulations and prices of the Federation Local wherein attraction is to perform. In signing this contract, the Employer acknowledges his (her or their) authority to do so, and also hereby assumes liability for the amount stated herein. Agreement of attraction to perform is subject to detention by sickness, accident, or accident to means of transportation used by attraction, or by any act or regulation of any public authority, civil tumult, strike, epidemic, serious interruption of transportation services or any legitimate or unavoidable cause, strikes, Acts of God, and conditions beyond control of such attraction or representative. There are no exceptions to this contract unless stipulated in writing. No deductions are to be made for any reason whatsoever.

The Employer agrees that the business agent of the Musicians' Local in whose jurisdiction this engagement is being played may have access to the function, for the purpose of conferring with the Musicians playing this engagement.

Music Corporation of America, or the undersigned employee on its behalf, acts only as agent and does not assume any obligation whatsoever, including but not limited to, any obligation imposed under and by virtue of the Social Security Act of the United States in connection with the services rendered ~~and assumed hereunder by the Attraction~~.

No part of the performance of attraction shall be broadcast by radio or otherwise.

If the compensation of Attraction is on a guarantee and percentage basis, then employer agrees:

(A) to use no passes except to bonafide newspaper representatives and not to reduce the stipulated dancing or admittance charges as herein fixed.

(B) that the dancing charge shall be

PER COUPLE $; MALE $; FEMALE $; SPECTATOR $

(C) that the additional (gate) charge (if any) for admittance shall be

PER COUPLE $; MALE $; FEMALE $; SPECTATOR $

(D) that the charge for auto parking shall be $; for clothes checking $

(E) M. C. A. shall have the privilege of using its own tickets exclusively, and also of appointing its own ticket takers, who shall take tickets at all entrances

YOU SIGN HERE

Accepted by Employer CRYSTAL BALLROOM BY ROY BARTELS

Street Address City and State DUBUQUE, IA. Phone

DO NOT WRITE BELOW THIS LINE

RETURN ALL COPIES SIGNED TO

Attraction Sign Here

By MUSIC CORPORATION OF AMERICA
Authorized Representative

Per

MUSIC CORPORATION OF AMERICA
430 N. MICHIGAN AVENUE
CHICAGO

American Federation of Musicians
License No. 1

FORM 1N

Plaintiffs' Exhibit "A" attached to Deposition.

399

Contract Blank

RECEIVED
CHICAGO OFFICE
MUSIC CORPORATION
OF AMERICA
1941 JUL 31 PM 1:32

MUSIC CORPORATION OF AMERICA

18 Old Bond St., W. 1. LONDON Phone Regent 6808 | 745 Fifth Avenue NEW YORK Phone Wisconsin 7-8800 | 430 N. Michigan Ave. CHICAGO Phone Delaware 1100 | M C A Building BEVERLY HILLS Phone Bradshaw 22211 | 111 Sutter Street SAN FRANCISCO Phone Exbrook 0932 | Union Commerce Bldg. CLEVELAND Phone Cherry 6010 | Mercantile-Commerce Petroleum Bldg. DALLAS Phone 2-1402

THIS CONTRACT for the personal services of musicians, made this 26 day of JULY, 1941

between the undersigned employer (hereinafter called the employer) and 13 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agrees to render collectively to the employer services as musicians in the orchestra under the

leadership of GRIFF WILLIAMS, according to the following terms and conditions:

Place of employment CRYSTAL BALLROOM, DUBUQUE, IOWA

Date(s) of employment SEPTEMBER 1, 1941

Hours of employment 9 PM to 1 A.M.

Price agreed upon $ 350 GUARANTEE WITH A 60% PRIVILEGE OF THE GROSS RECEIPTS
(Terms and amount)

To be paid $125 DEPOSIT, BALANCE BY 11 PM NIGHT OF ENGAGEMENT
(Specify when payments are to be made)

Plaintiffs' Exhibit "B" attached to Deposition.

Plaintiffs' Exhibit B for ID

Last 12.5 on 7.31.42

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer CRYSTAL BALLROOM
by ROY BARTELS

Street Address 1545 AUBURN ST.

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartels

Accepted

(Orchestra Leader)

By

MUSIC CORPORATION OF AMERICA

FORM B
44 Printed in U. S. A.

401

[fol. 555] Plaintiff's Exhibit C, attached to deposition of Griffith E. Williams

Griff Williams
And His Orchestra

Publicity
Section

In Newspaper Style

Typewritten, Double Spaced for Local Injections or Corrections . . . . . .

Temporary Heads Suggest Each Story's Angle With Plenty of Room for Your Editor to Write His Own Head . . . . Plain . . . . Readable . . . . Practical.

An assortment of one and two column news and ad mats and two color window cards, 14 x 22 are available.

May we suggest that you do not detach stories from manual? Instead, make typewritten releases, double spaced, which include your dates and location. It has been proven that newspapers give more attention to stories that appear to have been written locally.

Music Corporation of America

London New York Chicago Beverly Hills Dallas Cleveland San Francisco

[fol. 556] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois.

Billing Sheet: This is the correct billing.
Please do not deviate from it.

Music Corporation of America

presents

Griff Williams
And His Orchestra

featuring

Walter King—personable Irish tenor
Bob Kirk—baritone balladeer

and the

Williams Warblers

MCA

Note: Do not detach the stories contained in this manual. Instead make typewritten copies, double spaced, inserting date and location. Newspapers pay more attention to stories that appear to have been written locally.

MCA

J-C

[fol. 557] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois.

Recent Outstanding Engagements Of Griff Williams & His Orchestra

Stevens Hotel	Chicago
Mark Hopkins Hotel	San Francisco
Aragon Ballroom	Chicago
Trianon Ballroom	Chicago
Peabody Hotel	Memphis
Chase Hotel	St. Louis
Netherland Plaza Hotel	Cincinnati
Baker Hotel	Dallas
Adolphus Hotel	Dallas
Elitch's Gardens	Denver
Palomar	Los Angeles
Victor Hugo's	Los Angeles
Schroeder Hotel	Milwaukee

MCA

J-O

[fol. 558] Press Relations Department.
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Coming direct from the world famous Empire Room of the Palmer House in Chicago where he recently finished a long and successful engagement, Griff Williams brings his famous orchestra to the ..... for a limited engagement, thru arrangements with Music Corporation of America.

During his stay at the Palmer House, Griff broadcast nightly over the powerful WGN and Mutual network and was heard by millions of listeners from coast to coast. His smooth, suave, and danceable music was so highly rated by both the management and the patrons of the Empire Room that he is slated to return every year for the next five years.

Recently Griff and his orchestra were awarded a recording contract by Columbia Records on the Okeh label. Their ever increasing popularity and consistent airtime were some of the reasons for the contract.

The releases so far made by Griff have been very successful and can be heard on juke boxes throughout America. We believe it is safe to predict the Griff Williams band will be one of the top orchestras for 1942. Don't fail to see and hear him when he comes to the ..... on .....

MCA

L/1

[fol. 559] 430 North Michigan Avenue.
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams brings his famous orchestra to ..... on ....., through arrangements with Music Corporation of America.

Griff has a dynamic personality. In the course of an evening he will double at the piano, call the numbers for a square dance, or give a la conga exhibition himself.

A wily maestro, he was one of the first to recognize the trend to revive old favorites, Latin-American music, and waltzes.

This band, which recently smashed all records at the world's largest hotel, the Stevens in Chicago, has been a favorite of "straight" music fans at choice hotels, night clubs, theatres throughout the country, including, among others, the exclusive Aragon and Trianon Ballrooms, Chicago; the Peabody Hotel, Memphis; the Chase Hotel, St. Louis; the Netherland Plaza, Cincinnati; the Baker and Adolphus Hotels, Dallas; Elitch's Gardens, Denver; Palomar and Victor Hugo's in Los Angeles; the Schroeder Hotel, Milwaukee; and the Mark Hopkins in San Francisco where they stayed for four years.

They record for Varsity Records and are heard on the air over NBC, CBS, and MBS networks and on the Fitch Bandwagon program.

Featured with the band are Walter King, the personable Irish tenor, rich-toned Bob Kirk; baritone balladeer, and the Williams Warblers.

MCA

J-O

[fol. 560] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Gri. Williams & His Orchestra (2).

Among the spectators was Dorothy Bostwick of San Francisco's Junior League. She is now Mrs. Griff Williams.

MCA

J-O

[fol. 561] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

"I watch dancers' lips, as well as their feet, to learn if my music pleases," explains Griff Williams, who brings his

famous band to.....on.....
through arrangements with Music Corporation of America.
"If they sing, whistle, or hum as they dance by the bandstand, it's pretty good proof that the music is O.K."

Griff also taboos tricky or heavy orchestral arrangements. His are light and frothy and played as the composer intended—with the melody always distinguishable.

Loud, blatant music is out too, so far as the Williams organization is concerned. In Griff's opinion, dance music should be "listenable" as well as danceable. Guests "sitting out" should not have to strain or raise their voices above normal tone to be heard across the table.

"They can wear themselves out faster by shouting over orchestra din than by dancing," believes Griff. He strives for soft, mellow and subtle effects in swing as well as sweet music.

Griff's music has been popular in the Stevens Hotel, Chicago, where he broke all records; in the exclusive Aragon and Trianon Ballrooms in the same city; the Peabody Hotel, Memphis; the Chase Hotel, St. Louis; the Netherland Plaza, Cincinnati; the Baker and Adolphus Hotels, Dallas; Elitch's Gardens, Denver; the Palomar and the Victor Hugo, Los Angeles; the Schroeder Hotel in Milwaukee; and the Mark Hopkins Hotel in San Francisco where he played a record engagement of four years.

MCA

J-O

[fol. 562] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Playing late into the morning, band leaders like Griff Williams, who will appear with his orchestra at.....
.....on....., through arrangements with Music Corporation of America, seldom see the sun.

But that does not keep Griff from being athletic and, on occasion, a bit of a daredevil. It was during the first of his

four years' run at the famous Mark Hopkins Hotel in San Francisco that Griff performed the feat which "Friscans" are still talking about.

A guest who was one of the engineers constructing the great San Francisco Oakland Bay Bridge teased Griff about his sedentary life. Thoughtlessly Griff bet that he could do anything in the way of physical activity that the engineer could. Immediately the latter proposed that they walk across the catwalk of the incompleted bridge. Griff wanted to back out, but a considerable number of his fans had collected to hear the argument and he had to go through with the dare.

A large crowd accompanied them to the waterfront. Both men were equipped with life-preservers and searchlights, and a police motor launch and several pleasure boats trailed underneath to pick up whoever would fall.

The engineer, who knew the way, went first. Just short of his goal he turned around to see how far behind Griff was—and fell into the water.

[fol. 563] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

The breaks fall to Griff Williams, popular leader of the orchestra which will appear at.....on ....., through arrangements with Music Corporation of America.

His first came when he was substituting at the piano for Anson Weeks, who was on vacation. On his return, Weeks slipped on the soap in his shower and sprained his wrist. So Griff was kept on. Listening to him, Anson got to like him. When Weeks' wrist was good enough to play again, he changed the instrumentation of the band to make room for both himself and Griff.

It was from another member of Anson's band, incidentally, that Griff first got this thorough training in Latin-American music which makes him a favorite today among

followers of the rhumba and la conga. His instruction was a violinist from Spain named Xavier Cugat.

On location he often organizes "La Conga" nights and acts as an instructor himself. He takes his congaing so seriously that he once threw his back out of joint dancing with Producer Ruth Selwyn.

MCA

J-O

[fol. 564] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams was born in the Dalles, Oregon, but went to Stanford for his higher education.

He planned to be a physician but developed such an interest in music that he was given complete charge of all campus musical productions. For one of them, he wrote "Dream Music," now his theme song.

He went on with his pre-medical preparations, however, until an automobile accident changed the course of his life.

Griff smashed to smithereens a car belonging to a classmate who had planned to sell it to finance his next year in school.

Resolved that his pal should not stop his education because of him, Griff borrowed money to cover the cost of the car and then proceeded to pay it off by becoming a bandleader. Medicine would have to wait. It is still waiting.

Although he was sure now that music was his calling, Griff was not certain whether to try his hand at composing rather than leading. A Broadway producer persuaded him to write the score of a show. It was tried out in San Francisco and closed "before they could get the curtains open." So Griff became the leader of the famous band which will appear with him at.....on....., through arrangements with Music Corporation of America.

MCA

J-O

[fol. 565] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams, who will bring his famous orchestra to .....on....., through arrangements with Music Corporation of America, believes that cooking is a man's job. To back up his statement, he points out that the famous chefs are men, not women.

Publicly challenged to produce more than talk, by Miss Mildred Hickman, nationally known home economist, Griff recently cooked his notorious "Onion Soup a la Williams" before an audience of three hundred salivating women.

Stepping up to a new electric range, Griff called for two large onions, four potatoes, six slices of bacon, two tablespoonsful of butter, two boullion cubes, three cups of milk, salt, pepper, and paprika.

Then he diced the potatoes and steamed them until they were tender. He sliced the onions and sauted them until they were brown, then added bacon cut in strips and fried them until they were crisp.

While the hordes of women watched for him to make a mis-step, Griff seasoned to his taste with salt, pepper, and paprika, combined the cooked potatoes and the onion-bacon mix in a two-quart utensil and added milk.

He replaced it on the range, added boullion cubes, heated it until the cubes dissolved, served it,—and dashed off to a rehearsal.

MCA

J-O

[fol. 566] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Songs are like clothes fashions; according to Griff Williams who will appear with his famous orchestra at .....

.....on....., through arrrangements with Music Corporation of America. The good ones live on forever, returning to popularity time and again.

To prove his statement, the wily young maestro pointed to the present revival trend among the pace-setting bands in the country. Today, he observed, orchestra leaders are reviving one old song to every three new ones they add to their dance repertoires. Songs popular as far back as 1912 are finding their way into dance band repertoires in the form of medleys.

The current revival of square dancing, (for which Griff deserves considerable credit), has returned to prominence many of the "barnyard arias" popular a long time ago. Orchestras today must be prepared to answer requests for "Turkey in the Straw," "Old Macdonald," and the "Old Gray Mare."

One of the first to sense this trend, Griff has recently added to his list several "new-old-timers." Among them are "My Honey's Lovin' Arms," 1912; "They Go Simply Wild Over Me," 1917; "Everybody Shimmies Now," 1918; and "It Made You Happy When You Made Me Cry," 1926. Griff's recording of the "oldie," "Down by the Ohio," was, of course, a best-seller.

MCA

J-O

[fol. 567] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams, the genial maestro who brings his orchestra to ..... on ....., thru arrangements with Music Corporation of America, started studying the piano much against his will when he was seven.

His mother, a concert singer, wished him to be musical also. Griff appealed to his father, who made a deal with him: when Griff had mastered his dad's pet tune, "The Barber Shop Chord," he could quit playing.

But by the time he had learned it, however, he had grown to love the piano. He continued lessons under a German "professor" who made him play with a silver dollar on the top of each hand. If a dollar fell off he was punished.

By the time he was ten he was playing accompaniments for his mother. At twelve he had mastered the pipe organ to which, for a while, his interest switched. He played the organ in movie houses during his high school and early years at Stanford, until the advent of the talkies.

Pre-medical training interfered with his music for a while, although he managed to write all the campus musical productions at Stanford and take part in Ram's Head and Hammer and Coffin activities.

His medical career was cut off by the accidental smashing of a friend's car, for which he insisted on paying. To make the money he organized a band and took it into the famed Edgewater Beach Hotel in San Francisco. Following that, a two weeks' engagement at the Mark Hopkins Hotel lasted four years — and the climb to fame had begun.

MCA

J-O

[fol. 568] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

"The old-fashioned waltz is not only coming back — it's here, and is seriously challenging the 'jitterbug gymnastics' which have exhausted dancing America for the past several years!" So spoke genial Griff Williams, as he was preparing for his appearance at ..... on ....., through arrangements with Music Corporation of America.

His remark is based on his own actual observations while playing at leading hotels like the Stevens in Chicago, and the Mark Hopkins in San Francisco, among many others, as well as from reports of leader-friends in other parts of the country.

The consensus of opinion is that dancers today prefer to do modern interpretations of the old-fashioned waltz and two-step. The slow glide is replacing the bounce and hop of the swing dance era with collegians and prep school dancers, as well as with older folks.

Many children of the swing era have never even danced the waltz. Consequently their reactions are as enthusiastic as those associated with a new trend. Those who remember when the waltz was the No. 1 dance, now welcome its return.

Coincidental with the waltz trend is the public's demand for slow tunes, and ballads for dancing as well as listening. Meodies like "Stardust," "Body and Soul," and "Smoke Gets In Your Eyes," have become standards in the Williams repertoire because they are requested nightly.

Latin-American tunes, too, supplying their own dance steps, have rhumbad and la congad to popularity. On location Griff often features a "La Conga" night, with himself as one of the instructors. He sprained his back once doing la conga with Producer Ruth Selwyn.

MCA

J-O

[fol. 569] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams learned to play the piano with a silver dollar balanced on the back of each hand . . . The debate as to whether slim Griff resembles Fred Astaire more than Noel Coward cannot be settled by pointing out that Griff is about half a foot taller than either of them — and handsomer . . . Although a la conga expert (he once threw his back out of joint dancing with Producer Ruth Selwyn) he does not dance as well as Astaire — or write or act as well as Coward . . . At hotel locations Griff often runs "La Conga" and "Square Dance" nights, acting as an instructor himself . . . His wife, of recent date, is the former Dorothy Bostwick of San Francisco's Junior League . . .

Griff has been a puppeteer since he was thirteen and often entertains his friends at home with puppet shows he builds, improvises, and manipulates himself . . . On the road his favorite reading is a world atlas, and he conducts a quiz from it amongst his pinochle-playing men . . . His name was always Griff — never Griffith or Griffin, as some people suspect.

MCA

J-O

[fol. 570] Exclusive Management

Music Corporation of America

Producers of the World's Foremost Artists, Orchestras and Entertainment

London
16 Old Bond Street, W. I.
Phone Regent 6506

New York
745 Fifth Avenue
Phone Wickersham 2-8900

Chicago
430 N. Michigan Ave.
Phone Delaware 1100

Beverly Hills
M C A Building
Phone Bradshaw 23211

San Francisco
111 Sutter Street
Phone Exbrook 8922

Cleveland
Union Commerce Bldg.
Phone Cherry 6010

Dallas
Tower Petroleum Bldg.
Phone 2-1448

Seven Offices To Serve You—Each A Complete Unit In Itself

[fol. 570a] Plaintiff's Exhibit D, attached to deposition of Griffith E. Williams

Griff Williams

And His Orchestra

Publicity Section

In Newspaper Style

Typewritten, Double Spaced for Local Injections or Corrections . . . . .

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Music Corporation of America

London New York Chicago Beverly Hills Dallas San Francisco

[fol. 571] Publicity

M C A

Music Corporation of America

[fol. 572] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Billing Sheet: This is the correct billing.
Please do not deviate from it.

Music Corporation of America

presents

Griff Williams

And His Orchestra

featuring

Walter King—personable Irish tenor
Bob Kirk—baritone balladeer

and the

Williams Warblers

MCA

Note: Do not detach the stories contained in this manual. Instead make typewritten copies, double spaced, inserting date and location. Newspapers pay more

attention to stories that appear to have been written locally.

MCA

J-O

[fol. 573] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Recent Outstanding Engagements Of Griff Williams & His Orchestra

Stevens Hotel	Chicago
Mark Hopkins Hotel	San Francisco
Aragon Ballroom	Chicago
Trianon Ballroom	Chicago
Peabody Hotel	Memphis
Chase Hotel	St. Louis
Netherland Plaza Hotel	Cincinnati
Baker Hotel	Dallas
Adolphus Hotel	Dallas
Elitch's Gardens	Denver
Palomar	Los Angeles
Victor Hugo's	Los Angeles
Schroeder Hotel	Milwaukee

MCA

J-O

[fol. 574] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams brings his famous orchestra to .... on .....; through arrangements with Music Corporation of America.

Griff has a dynamic personality. In the course of an evening he will double at the piano, call the numbers for a square dance, or give a la conga exhibition himself.

A wily maestro, he was one of the first to recognize the trend to revive old favorites, Latin-American music, and waltzes.

This band, which recently smashed all records at the world's largest hotel, the Stevens in Chicago, has been a favorite of "straight" music fans at choice hotels, night clubs, theatres throughout the country, including, among others, the exclusive Aragon and Trianon Ballrooms, Chicago; the Peabody Hotel, Memphis; the Chase Hotel, St. Louis; the Netherland Plaza, Cincinnati; the Baker and Adolphus Hotels, Dallas; Elitch's Gardens, Denver; Palomar and Victor Hugo's in Los Angeles; the Schroeder Hotel, Milwaukee; and the Mark Hopkins in San Francisco where they stayed for four years.

They record for Varsity Records and are heard on the air over NBC, CBS, and MBS networks and on the Fitch Bandwagon program.

Featured with the band are Walter King, the personable Irish tenor, rich-toned Bob Kirk, baritone balladeer, and the Williams Warblers.

MCA

J-O

[fol. 575] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra (2)

Among the spectators was Dorothy Bostwick of San Francisco's Junior League. She is now Mrs. Griff Williams.

MCA

J-O

[fol. 576] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

"I watch dancers' dips, as well as their feet, to learn if my music pleases," explains Griff Williams, who brings his famous band to ..... on ..... through arrangements with Music Corporation of Ameri-

ca. "If they sing, whistle, or hum as they dance by the bandstand, it's pretty good proof that the music is O. K."

Griff also taboos tricky or heavy orchestral arrangements. His are light and frothy and played as the composer intended with the melody always distinguishable.

Loud, blatant music is out too, so far as the Williams organization is concerned. In Griff's opinion, dance music should be "listenable" as well as danceable. Guests "sitting out" should not have to strain or raise their voices above normal tone to be heard across the table.

"They can wear themselves out faster by shouting over orchestral din than by dancing," believes Griff. He strives for soft, mellow and subtle effects in swing as well as sweet music.

Griff's music has been popular in the Stevens Hotel, Chicago, where he broke all records; in the exclusive Aragon and Trianon Ballrooms in the same city; the Peabody Hotel, Memphis; the Chase Hotel, St. Louis; the Netherland Plaza, Cincinnati; the Baker and Adolphus Hotels, Dallas; Elitch's Gardens, Denver; the Palomar and the Victor Hugo, Los Angeles; the Schroeder Hotel in Milwaukee; and the Mark Hopkins Hotel in San Francisco where he played a record engagement of four years.

MCA

J-O

[fol. 577] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

The breaks fall to Griff Williams, popular leader of the orchestra which will appear at ..... on ....., through arrangements with Music Corporation of America.

His first came when he was substituting at the piano for Anson Weeks, who was on vacation. On his return, Weeks slipped on the soap in his shower and sprained his wrist. So Griff was kept on. Listening to him, Anson got to like him. When Weeks' wrist was good enough to

play again, he changed the instrumentation of the band to make room for both himself and Griff.

It was from another member of Anson's band, incidentally, that Griff first got this thorough training in Latin-American music which makes him a favorite today among followers of the rhumba and la conga. His instructor was a violinist from Spain named Xavier Cugat.

On location he often organizes "La Conga" nights and acts as an instructor himself. He takes his congaing so seriously that he once threw his back out of joint dancing with Producer Ruth Selwyn.

MCA

J-O

[fol. 578] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams was born in the Dalles, Oregon, but went to Stanford for his higher education.

He planned to be a physician but developed such an interest in music that he was given complete charge of all campus musical productions. For one of them, he wrote "Dream Music," now his theme song.

He went on with his pre-medical preparations, however, until an automobile accident changed the course of his life.

Griff smashed to smithereens a car belonging to a classmate who had planned to sell it to finance his next year in school.

Resolved that his pal should not stop his education because of him, Griff borrowed money to cover the cost of the car and then proceeded to pay it off by becoming a bandleader. Medicine would have to wait. It is still waiting.

Although he was sure now that music was his calling, Griff was not certain whether to try his hand at composing rather than leading. A Broadway producer persuaded him to write the score of a show. It was tried out in

San Francisco and closed "before they could get the curtains open." So Griff became the leader of the famous band which will appear with him at ..... on ....., through arrangements with Music Corporation of America.

MCA

J-O

[fol. 579] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams, who will bring his famous orchestra to .....on....., through arrangements with Music Corporation of America, believes that cooking is a man's job. To back up his statement, he points out that the famous chefs are men, not women.

Publicly challenged to produce more than talk, by Miss Mildred Hickman, nationally known home economist, Griff recently cooked his notorious "Onion Soup a-la Williams" before an audience of three hundred salivating women.

Stepping up to a new electric range, Griff called for two large onions, four potatoes, six slices of bacon, two tablespoonsful of butter, two boullion cubes, three cups of milk, salt, pepper, and paprika.

Then he diced the potatoes and steamed them until they were tender. He sliced the onions and sauted them until they were brown, then added bacon cut in strips and fried them until they were crisp.

While the hordes of women watched for him to make a misstep, Griff seasoned to his taste with salt, pepper, and paprika, combined the cooked potatoes and the onion-bacon mix in a two-quart utensil and added milk.

He replaced it on the range, added boullion cubes, heated it until the cubes dissolved, served it—and dashed off to a rehearsal.

MCA

J-O

[fol. 580] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Songs are like clothes fashions, according to Griff Williams who will appear with his famous orchestra at.....
.....on....., through arrangements with Music Corporation of America. The good ones live on forever, returning to popularity time and again.

To prove his statement, the wily young maestro pointed to the present revival trend among the pace-setting bands in the country. Today, he observed, orchestra leaders are reviving one old song to every three new ones they add to their dance repertoires. Songs popular as far back as 1912 are finding their way into dance band repertoires in the form of medleys.

The current revival of square dancing, (for which Griff deserves considerable credit), has returned to prominence many of the "barnyard arias" popular a long time ago. Orchestras today must be prepared to answer requests for "Turkey in the Straw," "Old Macdonald," and the "Old Gray Mare."

One of the first to sense this trend, Griff has recently added to his list several "new-old-timers." Among them are "My Honey's Lovin' Arms," 1912; "They Go Simply Wild Over Me," 1917; "Everybody Shimmies Now," 1918; and "It made You Happy When You Made Me Cry," 1926. Griff's recording of the "oldie," "Down by the Ohio," was, of course, a best-seller.

MCA

J-O

[fol. 581] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams, the genial maestro who brings his orchestra to.....on....., thru

arrangements with Music Corporation of America, started studying the piano much against his will when he was seven.

His mother, a concert singer, wished him to be musical also. Griff appealed to his father, who made a deal with him: when Griff had mastered his dad's pet tune, "The Barber Shop Chord," he could quit playing.

But by the time he had learned it, however, he had grown to love the piano. He continued lessons under a German "professor" who made him play with a silver dollar on the top of each hand. If a dollar fell off he was punished.

By the time he was ten he was playing accompaniments for his mother. At twelve he had mastered the pipe organ to which, for a while, his interest switched. He played the organ in movie houses during his high school and early years at Stanford, until the advent of the talkies.

Pre-medical training interfered with his music for a while, although he managed to write all the campus musical productions at Stanford and take part in Ram's Head and Hammer and Coffin activities.

His medical career was cut off by the accidental smashing of a friend's car, for which he insisted on paying. To make the money he organized a band and took it into the famed Edgewater Beach Hotel in San Francisco. Following that, a two weeks' engagement at the Mark Hopkins Hotel lasted four years—and the climb to fame had begun.

MCA

J-O

[fol. 582] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

"The old-fashioned waltz is not only coming back—it's here, and is seriously challenging the 'jitterbug gymnastics' which have exhausted dancing America for the past several years!" So spoke genial Griff Williams, as he was preparing for his appearance at.....on ....., through arrangements with Music Corporation of America.

His remark is based on his own actual observations while playing at leading hotels like the Stevens in Chicago, and the Mark Hopkins in San Francisco, among many others, as well as from reports of leader-friends in other parts of the country.

The consenses of opinion is that dancers today prefer to do modern interpretations of the old-fashioned waltz and two-step. The slow glide is replacing the bounce and hop of the swing dance era with collegians and prep school dancers, as well as with older folks.

Many children of the swing era have never even danced the waltz. Consequently their reactions are as enthusiastic as those associated with a new trend. Those who remember when the waltz was the No. 1 dance, now welcome its return.

Coincidental with the waltz trend is the public's demand for slow tunes, and ballads for dancing as well as listening. Melodies like "Stardust," "Body and Soul," and "Smoke Gets In Your Eyes," have become standards in the Williams repertoire because they are requested nightly.

Latin-American tunes, too, supplying their own dance steps, have rhumbad and la congad to popularity. On location Griff often features a "La Conga" night, with himself as one of the instructors. He sprained his back once doing la conga with Producer Ruth Selwyn.

MCA

J-O

[fol. 583] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams learned to play the piano with a silver dollar balanced on the back of each hand.....The debate as to whether slim Griff resembles Fred Astaire more than Noel Coward cannot be settled by pointing out that Griff is about half a foot taller than either of them—and handsomer.....Although a la conga expert (he once threw his back out of joint dancing with Producer Ruth

Selwyn) he does not dance as well as Astaire—or write or act as well as Coward.....At hotel locations Griff often runs "La Conga" and "Square Dance" nights, acting as an instructor himself.....His wife, of recent date, is the former Dorothy Bostwick of San Francisco's Junior League.....Griff has been a puppeteer since he was thirteen and often entertains his friends at home with puppet shows he builds, improvises, and manipulates himself..... On the road his favorite reading is a world atlas, and he conducts a quiz from it amongst his pinochle-playing men .....His name was always Griff—never Griffith or Griffin, as some people suspect.

MCA

J-O

[fol. 584]

Exclusive Management

Music Corporation Of America

Producers of the World's Foremost Artists, Orchestras and Entertainment

New York
745 Fifth Avenue
Phone Wickersham [redacted]-8900

Chicago
430 N. Michigan Ave.
Phone Delaware 1100

Beverly Hills
M C A Building
Phone Bradshaw 23211

San Francisco
111 Sutter Street
Phone Exbrook 8922

Cleveland
Union Commerce Building
Phone Cherry 6010

Dallas
Tower Petroleum Building
Phone 2-1448

London
16 Old Bond Street, W. I.
Phone Regent 6506

Seven Offices To Serve You—Each A Complete Unit In Itself.

Plaintiffs' Exhibit "E" attached to Deposition.

GRIFF WILLIAMS and his ORCHESTRA

MCA
MUSIC CORPORATION OF AMERICA

CHICAGO
STATE 5806

425

Plaintiffs' Exhibit "F" attached to

" attached to Deposition.

Frank M. Harker
Notary Public

427

Plaintiffs' Exhibit "G" attached to Deposition

Plaintiffs' Exhibit "I" attached to Deposition

COMING!
IN PERSON
MCA PRESENTS
A RARE TREAT
GRIFF
Williams
AND HIS FAMOUS
ORCHESTRA

GRIFF WILLIAMS

[fol. 606] Depositions of James K. Breyley and Joseph L. Kayser.

Filed in U. S. District Court December 11, 1944.

JAMES K. BREYLEY, of lawful age, having been by me, the said Roy B. Fuller, as Notary Public and Commissioner, as aforesaid, first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, was examined upon oral interrogatories, and he did thereupon depose, testify, and say as follows, viz.:

Direct Examination.

By Mr. Roberts:

Q1. Please give your name to the reporter.

[fol. 607] A1. James K. Breyley.

Q2. And where do you live, Mr. Breyley?

A2. 128 Church Road, Winnetka, Illinois.

Q3. What is your occupation?

A3. Executive booker of the Music Corporation of America.

Q4. What business is Music Corporation of America in?

A4. Booking bands, orchestras, artists, acts, and so forth—entertainment.

Q5. How long have you been with MCA?

A5. Eight years.

Q6. And by "MCA" you know that I refer to Music Corporation of America.

A6. Yes.

Q7. What are your duties as an employe of Music Corporation of America?

A7. Booking bands, orchestras and acts.

Mr. Cohen: I didn't get that, please.

The Witness: Booking bands, orchestras and acts.

By Mr. Roberts:

Q8. And were your duties much the same during the year 1941?

A8. Yes, about the same.

[fol. 608] Q9. Has your work for Music Corporation of America acquainted you with various orchestras who have leaders that have booking agreements with MCA?

A9. I would say so.

Q10. As a matter of fact, Mr. Breyley, what can you tell us as to whether you have to be familiar with orchestras, and their history, and their quality of music, in order to give information to people that are users, or that might be interested in the booking of bands?

Mr. Wilson: I think I had better object, until we get the foundation, as to what necessary information is required by people that want the bands.

Mr. Roberts: Go ahead and answer the question. That is just an objection for the record.

The Witness: Will you repeat your question, please?

(The pending question as above recorded was read by the reporter.)

By The Witness:

A10. We have to know the type of band we are selling; approximately the number of people; and where they have worked.

By Mr. Roberts:

[fol. 609] Q11. And something about the style of music?

A11. Yes.

Q12. Your work brings you in contact with persons that are looking for the services of orchestras, doesn't it?

A12. Yes.

Q13. And you may solicit other persons that you think may need the services of an orchestra?

A13. That is right.

Q14. What is your practice, if any, in soliciting engagements by MCA orchestras, with reference to advising a prospective music user of a particular orchestra's style or quality of music?

A14. What do you mean by — did you say "method"?

Q15. Practice.

Mr. Roberts: Read the question.

(The pending question as above recorded was read by the reporter.)

By The Witness:

A15. We have to describe it to him — on the phone, or a letter, or a wire, describing the type of band.

By Mr. Roberts:

Q16. And that is your custom, isn't it?

A16. That is right.

Q17. And that was true in 1941?

[fol. 610] A17. Yes.

Q18. What can you tell us as to whether Bill Carlsen and His Orchestra was one of the orchestras that you were familiar with, or acquainted with in MCA?

A18. I booked Bill Carlsen for quite a while.

Q19. Did he have a booking agreement and management contract with Music Corporation of America?

A19. Yes.

Q20. Do you recall when he first had such a booking agreement?

A20. I don't remember the exact time; I think somewhere in 1937 or 1938 — I should think, would be the starting time.

Q21. How long was such an agreement in existence?

A21. I don't remember the terms of the Carlsen contract; it is very possible it was a twenty-year contract — I think most of them were at that time.

Q22. Do you know how long it was before MCA became—

Mr. Cohen: (Interpolating) You said, "A twenty-year contract"?

The Witness: There was a twenty-year contract at that time. I cannot state that there was such a contract— that he had signed such a contract; I don't remember what the terms of his contract were.

[fol. 611] Mr. Wilson: Yes.

The Witness: But there were twenty-year contracts at that time; I think most of them were.

Mr. Cohen: I don't think his answer was responsive to your question.

Mr. Roberts: I am going to clear that up.

By Mr. Roberts:

Q23. Did he have more than one contract with Music Corporation of America; or do you know that?

A23. More than one management contract?

Q24. Yes.

A24. Not that I know of. I think Bill Carlsen has been out of business for about two years — two and a half years.

Q25. So that in other words —

Mr. Wilson: (Interpolating) I move that that voluntary answer be stricken there, the statement.

By Mr. Roberts:

Q26. Did I understand you to state that he had been out of business, for the last couple of years — Bill Carlsen?

Mr. Wilson: I will object to that, on the basis that it is immaterial.

[fol. 612] By The Witness:

A26. Yes.

By Mr. Roberts:

Q27. What can you tell us as to approximately the number of years that Bill Carlsen's Orchestra was in existence?

A27. I have known the band since about 1935.

Q28. Who assembled the orchestra, if you know?

A28. I don't know.

Q29. You don't know that?

A29. No, I don't; it would be my opinion that Carlsen assembled it.

Mr. Cohen: I object to the opinion of the witness.

By Mr. Roberts:

Q30. State whether you were the employe of Music Corporation of America who handled most of the bookings of Bill Carlsen's band?

A30. Yes, I handled most of Carlsen's bookings.

Q31. State what types of establishments were solicited, or contacted for engagements by Bill Carlsen and his orchestra.

A31. Well, theatres, ballrooms, parks, hotels, various organizations—like firemen's organizations, policemen's organizations, the Elks, Masonic Lodges, and school [fol. 613] parties.

Q32. College classes?

A32. College parties, proms, and so forth.

Q33. What can you tell us as to the length of some of those engagements?

A33. Some of them were one night, some were two-night, some a week, some ran as long as two or three or four weeks; I think he had one contract at the Trianon that was several months—he was there on different occasions, and I do not remember the length of the time of each contract.

Q34. And what can you tell us as to whether his band played engagements for those various types of establishments during the period that he had a booking agreement with Music Corporation of America?

The Witness: Will you state that again?

Mr. Roberts: Read it, please.

(The pending question as above recorded was read by the reporter.)

Mr. Cohen: I object to that question on the ground that it is confusing.

By Mr. Roberts:

Q34. (Continuing) All I want to know is whether the band played those engagements. I asked you first if you solicited them.

[fol. 614] A34. Yes, he played them.

Q35. That is all I wanted to know.

A35. He played them after they were booked.

Q36. Now, when you solicited those engagements by Bill Carlsen and his orchestra, did you follow the practice of advising those various organizations of the special quality of music played by the orchestra?

Mr. Cohen: I object to questions which are designed to elicit answers on engagements other than those in issue in this case, on the ground that such evidence would be immaterial and irrelevant.

Mr. Roberts: Now you may answer.

The Witness: I am still to answer?

Mr. Roberts: Yes.

By The Witness:

A36. Yes, we describe an orchestra when we sell it.

By Mr. Roberts:

Q37. You tell them something about the style?

A37. Yes.

Mr. Roberts: Will you mark this photostat Plaintiff's Exhibit "L" for identification?

(Said photostat was accordingly marked Plaintiff's Ex-
[fol. 615] hibit "L" for identification, as directed.)

Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Plaintiff's Exhibit "L" for identification is a true and correct photostatic copy of the contract for the engagement of Bill Carlsen and his orchestra at the Crystal Ballroom in Dubuque, Iowa, dated July 12, 1941; that said exhibit shall be treated for all purposes the same as though it was the original contract of which it is a photostatic copy, and may be offered in evidence without further identification, subject only to the objection that it is irrelevant and immaterial.

Is that all right?

Mr. Wilson: Yes.

Mr. Cohen: Yes.

By Mr. Roberts:

Q38. I will hand you what the reporter has marked Plaintiff's Exhibit L (handing document to witness), and ask you to examine that document, and tell us what it is, if you know.

A38. It is a contract for Bill Carlsen and his Orchestra, to appear August 17, 1941, at Dubuque, Iowa, at the Crystal Ballroom.

[fol. 616] Q39. Do you find your signature on there anywhere?

A39. At the bottom of the page, at the righthand corner.

Q40. What can you tell us as to whether you booked that engagement? A40. I sold it.

Q41. What can you tell us, as to whether Bill Carlsen had a management contract with MCA at the time that this contract, Plaintiffs' Exhibit L was executed—or the contract of which Plaintiffs' Exhibit L is a photostatic copy, was executed?

Mr. Wilson: I will object: The contract would be the best evidence.

By The Witness:

A41. There was a management contract.

By Mr. Roberts:

Q42. Was that the same contract that was executed—I believe you said, some time in 1937, between Bill Carlsen and the Music Corporation of America?

Mr. Wilson: Objected to, for the same reason.

By The Witness:

A42. I am sure that it was.

By Mr. Roberts:

Q43. What can you tell us as to whether the side men [fol. 617] in Bill Carlsen's orchestra were parties to the management contract with Music Corporation of America?

Mr. Wilson: Objected to again, for the same reason.

By Mr. Roberts:

Q43. (Continuing) Did they sign it?

A43. No, the contract was signed by Carlsen and by the Music Corporation of America.

Q44. Handing you again Plaintiffs' Exhibit L, I will ask you if you recognize the contract of which that exhibit is a photostatic copy, as any particular form of contract?

A44. It is a Form "B" contract.

Q45. And by that, you mean the Form "B" contract that was prepared by the American Federation of Musicians?

Mr. Wilson: I object to that.

By The Witness:

A45. Yes.

By Mr. Roberts:

Q46. Do you recall when this form was first used by Music Corporation in booking bands?

A46. Oh, it was either in June or July of 1941; I don't remember the exact month or date.

Q47. What can you tell us as to whether the Crystal [fol. 618] Ballroom could have obtained the services of Bill Carlsen and his orchestra for the engagement on

August 17, 1941, through Music Corporation of America, through the use of any other form of contract than the form of which Plaintiffs' Exhibit L is a photostatic copy?

Mr. Cohen: I object to that question as being leading, and suggestive of an answer.

By the Witness:

A47. No.

By Mr. Roberts:

Q48. That is, they could not have obtained—

A48. No.

Q49. (Continuing)—the services of that orchestra for this engagement without the use of the form of contract of which Plaintiffs' Exhibit L is a photostatic copy?

A49. No.

Q50. And you mean, by your answer "No," that they could not have?

A50. They could not have.

Q51. Is that right?

A51. They could not.

Q52. And when you say "they", you mean the Crystal Ballroom at Dubuque, Iowa?

[fol. 619] A52. Yes.

Q53. What can you tell us, Mr. Breyley, as to whether the side men of Bill Carlsen's orchestra ever had a written power of attorney, or other instrument in writing, signed by them, on file with Music Corporation of America, on July 12, 1941, in which Music Corporation of America was authorized to book and contract engagements for them?

A53. To the best of my knewledge we did not have any power of attorney for any side men in Carlsen's band.

Q54. Well, in the normal course of business, if there was such a power of attorney you would know about it, wouldn't you? A54. Yes.

Q55. And that was because of the fact of your position with the Company? A55. That is right.

Q56. What can you tell us as to whether any individual side man of Bill Carlsen's orchestra ever had a conversation with you with reference to Music Corporation of America acting as his agent of booking to contract for the engagement described in the contract dated July 12, 1941, of which Plaintiffs' Exhibit L is a photostatic copy?

[fol. 620] A56. Well, I don't know of any discussion that I had with any of the members of the band at all.

Q57. Regarding that matter?

A57. That is right.

Q58. I will ask you again to examine Plaintiffs' Exhibit L and—

Mr. Wilson: Is it an exhibit yet, or just offered, or marked?

Mr. Roberts: Just marked.

By Mr. Roberts:

Q58. (Continuing)—and call your attention to some writing, as follows:

"Rec'd 125.00. 7/16."

And then some initials; whose initials are those, do you know?

A58. They are, "M. E."; I think they are the initials of the girl that was on the reception desk.

Q59. And what do those figures signify to you, if anything?

A59. It is a representation that we received a deposit from Roy Bartels in the amount of $125.00, for the Bill Carlsen date on August 17, 1941.

Q60. That is, the Music Corporation of America received it? A60. That is right.

[fol. 621] Q61. What was done with that $125.00, if you know?

A61. It was placed in the bank, under one of our accounts.

Q62. To whose account would that be credited?

A62. On our books it would be credited as a deposit for Bill Carlsen.

Q63. What can you tell us as to whether withdrawals were made from that account in payment of your commission for booking the engagement?

A63. We deducted our commissions, and deposited it.

Q64. Were any other expenses sometimes deducted from the account?

A64. Occasionally.

Q65. If any balance remained in that account, state to whom it was paid, if you know.

A65. To Bill Carlsen.

Q66. I have referred in some of my questions to the term "side men": Just so the record will be straight, will you tell us what that term means in the trade?

A66. A side man is a musician that plays in an orchestra.

Q67. You mean by that, that he is a member of the orchestra other than the leader?

[fol. 622] A67. That is right.

Mr. Roberts: I will now offer in evidence Plaintiffs' Exhibit L.

Mr. Cohen: No objection.

Mr. Wilson: No objection.

(Said document was accordingly received, marked Plaintiffs' Exhibit L, certified under the name and signature of the Notary and Commissioner, duly made a part of this deposition and returned herewith, the same being in words and figures as follows, to-wit:—)

Contract Blank

RECEIVED
CHICAGO OFFICE
MUSIC CORPORATION OF AMERICA
1941 JUL 10 AM 9:17 MCA

MUSIC CORPORATION OF AMERICA

16 Old Bond St., W. 1. LONDON Phone Regent 6508
745 Fifth Avenue NEW YORK Phone Wickersham 2-8900
430 N. Michigan Ave. CHICAGO Phone Delaware 1100
M C A Building BEVERLY HILLS Phone Bradshaw 23211
111 Sutter Street SAN FRANCISCO Phone Exbrook 8922
Chicago Commerce Bldg. CLEVELAND Phone Cherry 8010
Tower Petroleum Bldg. DALLAS Phone 2-1448

THIS CONTRACT for the personal services of musicians, made this 12th day of JULY, 1941

between the undersigned employer (hereinafter called the employer) and twelve (including leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BILL CARLSEN, according to the following terms and conditions:

Place of employment: CRYSTAL BALLROOM DUBUQUE, IOWA

Date(s) of employment: AUGUST 17, 1941

Hours of employment:

Hours of employment

Price agreed upon $250 GUARANTEE WITH PRIVILEGE OF 60% OF THE GROSS RECEIPTS
(Terms and amount)

To be paid $125 DEPOSIT; BALANCE BEFORE 11 PM NIGHT OF ENGAGEMENT
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians Local in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer CRYSTAL BALLROM by Roy Bartels

Street Address P.O. BOX 371

City or State DUBUQUE, IOWA

Phone 6363

Accepted by Employer Roy Bartels

Accepted _____ (Orchestra Leader)

By MUSIC CORPORATION OF AMERICA
(Representatives of Employers)

FORM E

Plaintiffs' Exhibit "L" attached to Deposition

449

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
(Leader)			

[fol. 625] By Mr. Roberts:

Q68. What can you tell us, Mr. Breyley, as to whether Music Corporation of America ever had a booking agreement or management contract with Griff Williams?

A68. We had a management contract with Griff Williams.

Q69. Were you the employe of MCA who handled most of the bookings of engagements by his orchestra?

A69. Most of the out-of-town engagements in this territory.

Q70. You handled those? A70. Yes.

Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Plaintiffs' Exhibit M for identification is a true and correct photostatic copy of the contract for the engagement of Griff Williams and his Orchestra at the Crystal Ballroom at Dubuque, Iowa, dated July 26, 1941; that said exhibit shall be treated for all purposes the same as though it were the original contract of which it is a photostatic copy; and may be offered in evidence without further identification, subject only to the objection that it is irrele-
[fol. 626] vant and immaterial.

Is that all right?

Mr. Cohen: Yes.

Mr. Wilson: Yes.

(Said photostat was accordingly marked Plaintiffs' Exhibit M, as directed.)

By Mr. Roberts:

Q71. I will now hand you what the reporter has marked Plaintiffs' Exhibit M, and ask you if you recognize that as a photostatic copy of a contract for an engagement by Griff Williams and his orchestra at the Crystal Ballroom, Dubuque, Iowa, on September 1, 1941. (Handing document to witness.)

A71. I do.

Q72. What can you tell us as to whether your name or signature appears anywhere on the contract of which Plaintiffs' Exhibit M is a photostatic copy?

A72. It appears in the lower righthand corner.

Q73. What can you tell us as to whether you handled the booking of the engagement on September 1, 1941, of Griff Williams and his orchestra? A73. I sold it.

Q74. What can you tell us as to whether Griff Williams had a booking contract or a management contract [fol. 627] in effect on the date that the contract of which Plaintiffs' Exhibit M is a photostatic copy, was made?

A74. He had one.

Mr. Roberts: Will you mark this Plaintiffs' Exhibit N?

(Said document was accordingly marked Plaintiffs' Exhibit N, as directed.)

By Mr. Roberts:

Q75. I will now hand you what the reporter has marked as Plaintiffs' Exhibit N, (handing document to witness) and ask you to state what that document is, if you know.

A75. That is the management contract between the Music Corporation of America and Griff Williams.

Q76. Bearing what date?

A76. The 14th of February, 1934.

Q77. What can you tell us as to whether Griff Williams' genuine signature appears on that document?

A77. I am sure that that is Griff Williams' signature.

Q78. And whose signature appears on there under the heading, "Music Corporation of America"?

A78. Earl Bailey.

[fol. 628] Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Plaintiffs' Exhibit N is a true and correct photostatic copy of a contract dated February 14, 1934, between Griff Williams, as first party, and Music Corporation of America, as second party;

It is further stipulated and agreed that said exhibit shall be treated for all purposes the same as though it were the original contract of which it is a photostatic copy, and may

be offered in evidence without further identification, subject only to the objection that it is irrelevant and immaterial.

Is that satisfactory?

Mr. Wilson: I would like to re-word the last part: Subject to all objections, except as to its authenticity?

Is that all right?

Mr. Roberts: Well, of not being the original.

Mr. Wilson: Yes. I mean, we don't want to limit ourselves on objections.

Mr. Roberts: That is right; but I don't want any objection as to the fact that we do not have the original.

[fol. 629] Mr. Wilson: That is all right. Let me state it that way, that it will not be subject to objection on the basis that it is not—

Mr. Roberts: The original document.

Mr. Wilson: (Continuing)—the original document.

Mr. Roberts: Of which it is a photostatic copy. Is that right?

Mr. Wilson: Yes.

By Mr. Roberts:

Q79. What can you tell us, Mr. Breyley, as to whether the contract of which Plaintiffs' Exhibit N is a photostatic copy, was still in effect on July 26, 1941?

A79. It was.

Q80. Was it also in effect on September 1st, 1941?

A80. It was.

Q81. And when I say "it", of course you understand that I am referring to that contract of which Plaintiffs' Exhibit N is a photostatic copy.

Mr. Roberts: Plaintiffs offer in evidence, Plaintiffs' Exhibit M, and also offer in evidence Plaintiffs' Exhibit N.

Mr. Wilson: We object to Plaintiffs' Exhibit N, as im-
[fol. 630] material and irrelevant.

(Said documents were accordingly received, marked respectively Plaintiffs' Exhibits M and N, each being respectively certified under the name and signature of the Notary and Commissioner, and duly made a part of this deposition and returned herewith, the same being respectively in words and figures as follows, to-wit:—)

Contract Blank

RECEIVED
CHICAGO OFFICE
MUSIC CORPORATION
OF AMERICA

MUSIC CORPORATION OF AMERICA

1941 JUL 21 PM 1:32

16 Old Bond St., W. 1	745 Fifth Avenue	430 N. Michigan Ave	M.C.A. Building	111 Sutter Street	Union Commerce Bldg	Tower Petroleum Bldg
LONDON	NEW YORK	CHICAGO	BEVERLY HILLS	SAN FRANCISCO	CLEVELAND	DALLAS
Phone Regent 6505	Phone Wickersham 2-8900	Phone Delaware 1100	Phone Bradshaw 23211	Phone Exbrook 8922	Phone Cherry 601	Phone 2-1448

THIS CONTRACT for the personal services of musicians, made this 26 day of JULY, 1941

between the undersigned employer (hereinafter called the employer) and 13 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of GRIFF WILLIAMS, according to the following terms and conditions

Plaintiffs' Exhibit "M" attached to Deposition.

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Place of employment CRYSTAL BALLROOM, [illegible], IOWA

Date(s) of employment SEPTEMBER 1, 1941

Hours of employment 9 PM to 1 A.M.

Price agreed upon $ 350 GUARANTEE WITH A 60% PRIVILEGE OF THE GROSS RECEIPTS
(Terms and amount)

To be paid $125 DEPOSIT, BALANCE BY 11 PM NIGHT OF ENGAGEMENT
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer CRYSTAL BALLROOM
by ROY BARTELS

Street Address 1545 AUBURN ST.

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartels

Accepted
(Orchestra Leader)

By [signature]
PUBLIC CORPORATION OF AMERICA

FORM B

Printed in U. S. A.

Plaintiffs Exhibit B for Sec. FMH

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
_____ (Leader)			$

Agreement entered into between GRIFF WILLIAMS first party, and MUSIC CORPORATION OF AMERICA, a corporation, second party.

1. Whereas first party is a musician and orchestra leader whose services as such are extraordinary and unique and second party is engaged in the business of representing musicians and orchestras, arranging and booking orchestras and musical entertainment, and has a large following and international reputation and an established, recognized business and good will, and by virtue thereof, first party recognizes that an association with second party, will enhance the commercial value and financial returns of first party, wherefore first party desires to appoint second party as exclusive agent and representative to sell and market the services of first party and his orchestra or both,

NOW, THEREFORE, in consideration of the premises, of One Dollar ($1.00) in hand paid to first party and of the services heretofore, now or hereafter rendered by second party in soliciting, arranging and/or booking engagements for first party or his orchestra, or both, first party hereby appoints second party as the sole and exclusive agent and representative for and on behalf of first party and/or his orchestra as now constituted composed of 11 musicians, (subject to change in number and personnel by mutual agreement only) to sell and market the services of first party or said orchestra, or both, and/or to book or arrange performances or engagements in any parts of the world for any and all services of first party as musician, actor, announcer, performer, entertainer, musical director, and/or in any other capacity which first party may fill, individually or in conjunction with any person, firm or corporation, any orchestra or organization, any recording company, any talking picture company, any broadcasting company or in conjunction with any other phase of entertainment, whether now conceived or not, or .....

.....

.....

engagement

otherwise, beginning approximately at end of Edgewater Beach / and continuing until such time as second party shall have received as compensation from first party a total sum of

One Hundred Thousand ($100,000) Dollars,

pursuant to paragraph 10 hereof, unless sooner terminated as hereinafter provided. The orchestra of first party shall be known as GRIFF WILLIAMS AND HIS ORCHESTRA

.....

.....

and first party agrees to appear, perform and play in person during all engagements or bookings of first party or his orchestra or both, pursuant hereto.

During the term hereof, first party agrees that he will not play, perform, act or render any services either as musician, actor, performer, or entertainer or in any other capacity for entertainment purposes, whether now conceived or not, either individually or in conjunction with any other person, firm or corporation or with the members of his orchestra or with any other orchestra or theatrical company or any moving picture company or for any broadcasting or radio company or station, or for any recording or reproducing company or otherwise, except by and with the written consent of second party first had and obtained, unless it be on an engagement obtained by second party.

Plaintiffs' Exhibit "N" attached to Deposition.

2. Second party accepts said appointment and agrees to devote such time as it shall determine and furnish the services of its organization in such manner as it shall deem advisable, to the end that it may best market the services of and solicit engagements for first party or said orchestra or both.

3. First party hereby represents that he and all members of his orchestra are and will continue to be members in good standing of the American Federation of Musicians and that the constitution, rules, by-laws and regulations of the said Federation will be complied with, first party hereby assuming all responsibility for non-compliance therewith. First party also agrees that he will at all times pay the musicians who are members of his orchestra, a sum not less than the Federation scale in force and effect at each place where any engagement shall be played by first party and his orchestra, it being understood that payments shall be made in periods not more than one week apart. Nothing in this contract shall ever be so construed as to interfere with any obligation which first party may have to the American Federation of Musicians.

4. First party agrees that any and all leads, communications, requests or solicitations for engagements and/or performances received by first party, either for his services individually or in conjunction with his orchestra, or with any other orchestra or company, or otherwise embraced within the provisions of this agreement, shall promptly be referred by first party to second party.

5. In the event that first party in violation of Paragraph 1 hereof, shall attempt to or shall appear or perform, either as musician, actor, performer or entertainer, or in any other capacity for entertainment purposes, whether now conceived or not, either individually or in conjunction with any other person, firm or corporation, or with the members of his orchestra or with any other orchestra or theatrical company or with a moving picture company or for a broadcasting or radio company or station, or for a recording or reproducing company or otherwise, then second party shall have the right to enjoin and restrain such appearance or performance of first party by injunction issued from any court of competent jurisdiction, first party hereby agreeing that such injunction shall issue and further agreeing that any and all services rendered or to be rendered by first party are extraordinary and unique and cannot be replaced or duplicated, and that the damages of second party in the event of the violation by first party of paragraph 1 hereof, cannot be ascertained and will be irreparable.

6. First party agrees further that for and during the term of this contract, first party will not allow his name or that of his orchestra to be advertised by any management, or by any person, firm or corporation (other than second party) except by and with the written consent of second party first had and obtained. In the event first party shall violate the provisions of this paragraph, then second party shall have the right to restrain and enjoin such violation by injunction issued from any court of competent jurisdiction.

7. While second party does not guarantee bookings or engagements hereunder, second party does agree to use its best efforts and the services of its comprehensive organization to solicit bookings and engagements for first party, or said orchestra, or both. All engagements obtained by second party may be contracted for in the name of first party, and second party shall in no manner be liable or responsible to first party in the event that during the term hereof first party, or said orchestra, or both, shall not obtain, perform or play any engagements. Second party shall in no manner be liable or responsible to first party, or said orchestra, or both, for the performance or non-performance of booking contracts or engagements obtained for first party or entered into by second party on behalf of or in the name of first party and second party shall in no manner be liable to first party or said orchestra, or both, for any payments or amounts due or to become due to first party, or said orchestra or both, for services rendered pursuant to such bookings or engagements. The commission provided for in paragraph 10 hereof, to be paid to second party, shall be based upon the compensation actually paid to or received by first party, or his orchestra, or both, upon all engagements of first party or his orchestra or both, during the term hereof

8. For and in consideration of engagements played by first party or said orchestra or both pursuant hereto, first party agrees that first party or said orchestra or both, will not accept or play engagements at any place for a period of eighteen (18) months from the last date when first party and or his orchestra shall have performed an engagement or booking at such place pursuant to this contract, except and unless such engagement shall be played pursuant to a booking by second party or with the written approval of second party first had and obtained.

9. In the event that for a "period" in excess of 29 cumulative days during any fiscal year hereof, first party or his orchestra shall not perform or play any engagement or booking of any kind whatever, and first party shall not have been offered any engagement or booking to be performed during said "period" either by first party or his orchestra, or both, and in the event further that the total compensation for the services of first party and his orchestra upon all engagements performed or played from the first engagement hereunder to the end of the last engagement hereunder, shall be less than the average amount per day mentioned in paragraph 11 hereof, computed for the period of time from the first engagement hereunder to the expiration of said number of cumulative days, then this contract may thereafter be terminated by first party by virtue thereof, provided ten days previous notice in writing be delivered to and received by second party.

Plaintiffs' Exhibit "N" attached

... delivered to and received by second party.

10. So long as this contract shall be in effect, and until the conclusion of any engagement entered into during the term of this contract, first party agrees to pay to second party for the services of second party hereunder, the following compensation, to-wit:

20 % on all engagements for a period of less than seven days at one place;

10 % on all engagements performed at one place for seven days or more, where the gross weekly sum paid for the services of first party and his orchestra, shall be $ 2000.00 or less per week, which commission shall be increased at the rate of 1% for each additional $100.00 per week in excess of said sum per week paid for the services of first party and his orchestra, and said total increased commission shall be computed upon the gross weekly sums paid for the services of first party and his orchestra, provided, however, that said total increased commission shall in no event be in excess of 15 %.

The said respective commissions shall be calculated and based upon the moneys paid for the services of first party and his orchestra and for all services of first party alone, upon each class and kind of engagement as aforesaid performed or played by first party or said orchestra or both. The said percentages shall be average maximum percentages to be figured and based upon all engagements respectively of the class and kind set forth above, played by first

...ched to Deposition.

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party or said orchestra or both, during each fiscal year hereof. First party agrees to pay to second party weekly, such part of the difference between the Federation scale and all sums received by first party for the services of first party or said orchestra or both for engagements played, as together with previous payments made by first party to second party, will attain or equal (as near as possible) the said respective maximum average percentages due second party for all engagements played up to such time, and accordingly the percentages thus paid by first party to second party may, during certain weeks, be less and during other weeks be more, than the respective maximum average percentages for the kind and class of engagements played in accordance with the above provision. In addition to the commission due second party hereunder, first party also agrees to pay all commissions or charges which may be required to be paid as compensation or commission to any theatrical or publicity agent or agent other than second party in connection with any engagements of first party or his orchestra or both, which such commissions or charges may be deducted from the compensation to which first party may be entitled to receive upon engagements played. It is understood, however, that out of, and from all moneys received by first party upon engagements played hereunder, first party shall always retain a sum not less than the Federation scale in force and effect at the places where such engagements are played for which moneys are so received by first party, in payment for his own services and for all members of his orchestra.

9. First party hereby authorizes second party to execute any and all contracts for and on behalf and in the name of first party for the services of first party or his orchestra, or both, for engagements or bookings pursuant hereto, at such place or places, for such time and compensation as second party shall procure, provided further that all such bookings or engagements shall comply with the rules and regulations of the American Federation of Musicians, and first party agrees to fulfill and perform any and all such contracts so entered into on behalf of first party by second party. [redacted]

11. Subject to the provisions of paragraph 7 hereof, it is understood that upon the termination of this contract, first party and said orchestra shall together have received an average of not less than $ 150.00 per day upon engagements actually played for which compensation was received and that the total moneys so received shall in no event be less than the sum of the Federation scales for all engagements actually played for which compensation was received.

12. Upon request of first party, second party agrees to use its best efforts to assist first party in procuring musicians to constitute the orchestra of first party. It is agreed, however, that any and all musicians constituting the orchestra of first party, even though second party shall assist in procuring any of such musicians, shall at all times be deemed to be employees of first party only, and no such musicians constituting the orchestra of first party shall be deemed employees of second party. First party hereby agrees that second party may employ musicians for first party upon request of first party and second party agrees to advise musicians so employed that they are engaged for and on behalf of first party only.

13. First party agrees to advertise and help popularize any and all musical compositions and selections as second party shall request, the same to be done by the frequent playing of such compositions and selections upon all engagements of first party and or his orchestra or in such other manner as second party shall determine. Any and all expenses incurred by first party in connection with such advertising shall be paid for by second party, provided first party shall in writing have been authorized to incur the same. Second party shall have the right to use the name of first party either individually or with his orchestra in all advertising matter of second party; and upon request of second party, first party agrees to sign any and all testimonials and endorsements. Second party shall have the right to use the name and photographs of, and any other publicity matter relating to first party and/or his orchestra, in conjunction with publicity or advertising matter of the MUSIC COLLEGE OF AMERICA, an institution which may now or hereafter be engaged in the music business, and of any other corporation or business in which second party may have any interest, directly or indirectly.

14. So long as this contract shall be in force and not terminated as herein provided, first party agrees that he will not accept any engagements for himself or his orchestra or both, or for any other orchestra, nor will first party engage in a business similar to the business of second party, except by and with the written approval and consent of second party first had and obtained, and in no event shall any engagement be accepted or played by first party or his orchestra or both, at a sum less than the Federation scale in force and effect at the place or places where such engagements are to be played. Second party agrees never to procure or contract for any engagement on behalf of first party in violation of the rules and regulations of the American Federation of Musicians or any local union thereof.

15. In the event second party shall obtain bookings or engagements for first party pursuant to the provisions hereof and in the event thereafter, first party shall refuse to perform any such engagements or shall be unable so to do by virtue or because of illness, desire for a vacation or rest, then for the purposes of paragraph 9 hereof, it shall be deemed first party had played or performed and that second party had obtained an engagement so agreed upon as aforesaid, and the full time of such engagement so obtained, shall be counted and computed as if first party had actually performed or played such engagement, in determining whether or not there has been a lapse of the requisite number of cumulative days within any fiscal year under paragraph 9 hereof.

16. In the event this contract be terminated by first party pursuant to paragraph 9 hereof, and in the event thereafter a booking arranged and obtained by second party is accepted by first party or his orchestra, or both, then the acceptance of such subsequent engagement or booking shall automatically reinstate this contract with all of its provisions including Paragraph 9 thereof, for the balance of the original term hereof.

Plaintiffs' Exhibit "N" attached to Deposition.

17. In the event first party shall not receive or shall be unable to collect any moneys due for engagements or bookings performed or played by first party, or his orchestra, or both, and as a result thereof second party shall not receive the compensation thereon to which it is entitled pursuant hereto, then first party agrees to file any and all necessary claims therefor with the American Federation of Musicians and also to take any and all other legal action necessary to collect the same, and upon obtaining the amount due, or any part thereof, first party agrees forthwith to pay unto second party, the compensation thereon to which second party is entitled pursuant hereto, which compensation may be deducted from any sums thereafter becoming due to first party upon any engagements or bookings played by first party or his orchestra or both.

18. First party agrees for himself and the members of his orchestra that after the termination of this agreement by lapse of time or otherwise, neither he nor his orchestra, or its members, will copy, simulate or use any of the advertising and/or publicity material at any time prepared, furnished and/or used by first and/or second party, in connection with engagements or bookings of first party or his orchestra, or both, pursuant hereto.

19. In connection with soliciting and/or the performance of engagements pursuant hereto, first party and his orchestra shall be known and advertised under the name of .....

.....

or some other name as second party shall in its sole discretion determine. Neither the first party nor his orchestra shall have any right, title or interest in and to said specific name or any other name hereafter adopted, by virtue of the use of the same pursuant hereto. First party acknowledges that said specific name and any other names used for first party and his orchestra pursuant hereto, is and are the property of second party, permission being hereby given to first party to use the same only so long as second party desires. Upon the termination of this agreement, whether by lapse of time or otherwise, then and thereafter, neither first party, his orchestra or its members, shall have any right to use said specific name or any other name hereafter adopted, for any purpose whatever, but second party shall have the sole right to use such name or names in conjunction with any other orchestra or orchestras or may allow other persons to use said name or names in conjunction with orchestras of such persons. Second party shall have the right by injunction to restrain a violation of the provisions of this paragraph.

20. The invalidity or illegality of any paragraph or clause in this contract contained, shall in no way affect the validity or legality of all other paragraphs or clauses hereof, which can be given effect without such invalid or illegal part; and all such other clauses, paragraphs and agreements herein contained, shall be binding upon the parties hereto with the same full force and effect as though such invalid or illegal portion, paragraph or clause, were not contained in this agreement.

No waiver or modification by first or second party of the terms of this agreement, whether in one or more instances, shall be deemed to permanently or thereafter modify or waive the terms of this agreement, except in the specific instance of any express waiver or modification by the mutual agreement of the parties.

This contract shall inure to the benefit of second party, its successors and assigns, and shall be construed and enforced in accordance with the laws of the State of Illinois. This agreement cancels and supersedes all previous agreements.

It is understood that the words "engagement", "performance", "playing", "services" and all similar words in this agreement contained, shall refer to and include all services which may be performed by first party, his orchestra or both, including the services of first party as leader and/or director of any orchestra or orchestras or as an actual performer of any musical instrument, individually or in conjunction with or as part of any orchestra, or as actor, announcer, performer, entertainer and/or in any other capacity which first party may fill, and including all personal appearances of first party in any cafe, dance hall or place of entertainment, all appearances of first party before the microphone for broadcasting and/or television, all appearances of first party for moving picture purposes, all services of first party in making recordings and records, all appearances of first party for all and any other purposes of entertainment, whether now conceived or not, and all other appearances, even if not for entertainment purposes, when compensation in any form shall be paid. The word "orchestra" whenever used herein shall be deemed to include the orchestra of first party with the number and personnel as constituted, changed or reorganized from time to time. Each period of twelve months beginning with the first engagement hereunder, shall be deemed to be a "fiscal year" as the said term "fiscal year" is used herein.

Second party shall have no right to cancel or terminate any contract or engagement procured by second party for first party without written consent of first party.

The portions of this contract which have been struck out, crossed out or added are so done by mutual agreement of the parties.

IN WITNESS WHEREOF first party has hereunto affixed his hand and seal and second party has caused this agreement to be signed by its duly authorized officer this 14 day of February A. D. 19 34

Jiff Williams (SEAL)
(First Party)

(SEAL)
(First Party)

MUSIC CORPORATION OF AMERICA
(Second Party)

By Earl F. Bailey

Copyright 1932 by Music Corporation of America

Plaintiffs' Exhibit "N" attached to Deposition.

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[fol. 637] By Mr. Roberts:

Q82. Calling your attention again to Plaintiffs' Exhibit M, do you find from an examination of Plaintiffs' Exhibit M that there appears some handwritten entries as follows:

"Recd 125.00 7/3",

and then some initials; and whose are they?

A82. The girl on the reception desk.

Q83. What are those initials?

A83. I think they are, "M.E."

Q84. What does that entry on the contract signify to you, if anything?

A84. The receipt of a deposit of $125.00 from Roy Bartels in Dubuque.

Q85. What can you tell us, Mr. Breyley, as to whether the side men in Griff Williams' orchestra ever had a booking contract with MCA during the year 1941 on which their signatures appear?

A85. There was none to my knowledge.

Q86. And you would have known of it in the ordinary course of business, wouldn't you?

A86. Yes.

Q87. By reason of your position with MCA?

A87. Yes.

Q88. What can you tell us as to whether any individual [fol. 638] side man in Griff Williams' orchestra ever had a written power of attorney on file with Music Corporation of America during the year 1941, authorizing Music Corporation of America to book and contract engagements for him?

A88. There weren't any.

Q89. There were no such contracts, or no such written powers of attorney?

A89. No.

Q90. By any side men?

A90. No.

Q91. Was there any other instrument in writing signed by the side men, on file with MCA during that year, authorizing it to act for them in booking engagements?

A91. No.

Q92. You mean by that that there wasn't any such instrument?

A92. There wasn't any.

Q93. What can you tell us as to whether any individual side man in Griff Williams' orchestra ever had a conversation with you about MCA acting for him in booking engagements?

A93. I do not recall of any.

Q94. You do not recall of any conversations?

[fol. 639] A94. No.

Q95. Between you and any side man of Griff Williams' orchestra?

A95. No.

Q96. With reference to Music Corporation of America booking engagements for him?

A96. No.

Q97. Is that right?

A97. There wasn't any discussion with the musicians about any bookings.

Q98. And when you say "musicians", you mean the side men in Griff Williams' orchestra?

A98. That is right.

Q99. Mr. Breyley, you appeared here for the taking of this deposition, in response to a subpoena?

A99. Yes.

Mr. Roberts: That is all.

Cross-Examination.

By Mr. Cohen:

Q100. Mr. Breyley, this contract between the Music Corporation of America and Griff Williams was executed in 1934; is that correct? (Indicating Plaintiffs' Exhibit N.)

A100. That is right.

[fol. 640] Q101. Now, were any modifications or alterations of that contract executed subsequent to that date, between Griff Williams and MCA?

A101. You mean, since 1934?

Q102. Yes.

A102. Yes.

Q103. When were they?

A103. There was a new contract—a new management contract made in September, 1941.

Q104. Can you give us the exact date?

A104. No, I cannot give you the exact date.

Q105. Were there modifications prior to September, 1941?

A105. I don't think I can tell you accurately.

Q106. You don't know, then, whether this Plaintiffs' Exhibit N was in force in the form in which it is here presented, in July of 1941, or September of 1941; is that correct?

The Witness: Would you repeat that last part again?

(The pending question as above recorded was read by the reporter.)

Mr. Roberts: That is objected to as asking for an answer contrary to the witness own testimony.

[fol. 641] Mr. Cohen: This is cross-examination.

By The Witness:

A106. Well, I am sure that we were booking him under the terms of that contract (indicating Plaintiffs' Exhibit N).

By Mr. Cohen:

Q107. Well, you are unable to state—isn't this correct—whether or not there were any modifications of Plaintiffs' Exhibit N, between 1934 and July, 1941; is that true?

A107. Is it possible to ask a question off the record, or answer a question that is off the record?

Q108. Well, can you answer my question without?

A108. To the best of my knowledge that is the contract that was in effect, and if there were any modifications to it, they would have been attached to the contract. And that is why I am asking if I can ask you one thing, then I can tell you what I am trying to tell you.

Mr. Cohen: O. K.

(Here ensued a brief colloquy off the record, omitted as directed by counsel.)

Mr. Cohen: Back on the record:

By Mr. Cohen:

Q109. Was this Plaintiffs' Exhibit N complied with [fol. 642] by both parties during the existence of the agreement?

A109. To the best of my knowledge, it was.

Q110. Do you know whether Griff Williams had the same aggregation of musicians during the entire period from 1934 to 1941?

A110. No, I don't know.

Q111. You don't know whether he did or not?

A111. No.

Q112. Is it possible, then, that he may have changed the side men in his orchestra from time to time?

Mr. Roberts: Objected to as calling for a speculative answer, the witness already having shown by his testimony that it would just be a guess.

By Mr. Cohen:

Q112. (Continuing.) Well, if he had changed the side men in his orchestra during this period an alteration of this contract would have been necessary; isn't that true?

Mr. Roberts: Objected to, as argumentative, calling for the opinion and conclusion of the witness.

Mr. Cohen: You may answer that.

The Witness: Would you state your question again?

[fol. 643] (The pending question as above recorded was read by the reporter.)

By The Witness:

A112. No.

By Mr. Cohen:

Q113. Will you read the first page of Plaintiffs' Exhibit N (handing document to witness), the paragraph starting with,

"Now, Therefore,"

the part starting with,

"first party hereby appoints second party as the sole and exclusive agent and representative for and on behalf of first party"—

read that aloud, please.

A113. (The witness reading from Plaintiffs' Exhibit "N"):

"Now, Therefore, in consideration of the premises, and of One Dollar ($1.00) in hand paid to first party and of the services heretofore, now or hereafter rendered by second party in soliciting, arranging and or booking engagements for first party or his orchestra, or both, first party hereby

appoints second party as the sole and exclusive agent and [fol. 644] representative for and on behalf of first party and/or his orchestra as now constituted composed of 11 musicians, (subject to change in number and personnel by mutual agreement only)".

Q114. All right. Now, is it your understanding, then, that the contract does provide for a modification by mutual agreement when the components of Griff Williams' orchestra altered?

Mr. Roberts: Objected to, as calling for a conclusion and legal opinion of the witness, the witness not shown competent.

By The Witness:

A114. Trying to make a lawyer out of me! (Witness examines Plaintiffs' Exhibit N.) Well, I am still of the same opinion.

By Mr. Cohen:

Q115. Well, would it be correct, and fair to state that you think that this contract in this form was in effect in July, 1941, but that you are not sure?

A115. No, I would not say that.

Q116. Mr. Breyley, is it possible that powers of attorney may have been executed by the side men, in either Bill Carlsen's orchestra, or Griff Williams' orchestra, and deposited with Bill Carlsen, or Griff Williams, without your knowledge?

[fol. 645] A116. It is possible that they could be; it is not very probable that they were, without my knowledge.

Q117. Well, do you know everything that went on between the side men, in each of those orchestras, and the leader?

A117. No.

Q118. You don't know whether or not they ever discussed the fact that MCA was the booking agent for that orchestra, do you?

A118. No.

Mr. Cohen: That is all.

Mr. Wilson: I have no questions.

(End of deposition.)

Mr. Fuller (Commissioner): Mr. Witness, counsel have stipulated to waive the reading and signing of your deposition. Do you wish to waive the reading and signing of your deposition?

The Witness: Yes, I waive the reading and signing of my deposition.

The reading of his foregoing fully transcribed deposition, and the signing thereof by the said witness, James K. Breyley, were by stipulation by and between counsel for the parties, and by the witness, duly waived:

[fol. 646] ROY E. FULLER,
Notary Public, Cook County, Illinois.

My Commission expires June 7 A.D. 1947.

(Seal) Commissioner

[fol. 647] Mr. Roberts: Will you please administer the oath to Mr. Kayser?

And the said JOSEPH L. KAYSER, of lawful age, having been by me, the said Roy E. Fuller, as Notary Public and Commissioner, as aforesaid, first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, was examined upon oral interrogatories, and he did thereupon depose, testify, and say as follows, viz.:

Direct Examination.

By Mr. Roberts:

Q1. Will you give your name to the reporter?

A1. Do you want my initials? I usually go by the name of "Joe Kayser"—Joseph L. Kayser (spelling) K-a-y-s-e-r.

Q2. But you usually go by—

A2. Just "Joe Kayser".

Q3. Where do you live?

A3. 6431 North Claremont, Chicago.

Q4. You came here this morning in response to a subpoena?

A4. Yes, sir.

[fol. 648] Q5. Were you formerly employed by Frederick Bros. Music Corporation?

A5. I was.

Q6. Did they have an office in Chicago?
A6. Yes.
Q7. Were you employed in that office?
A7. Yes.
Q8. How long were you with that concern?
A8. Five years.
Q9. Can you give us approximate dates, that is, by years?
A9. May, 1939, to May 1st, 1944.
Q10. What business was Frederick Bros. Music Corporation engaged in during the period you were with them?
A10. Artists' representatives, booking of bands of acts.
Q11. What were you duties, in a general way?
A11. Executive booker.
Q12. You handled bookings, some of orchestras, and some of the others?
A12. Yes, of orchestras only.
Q13. Of orchestras only?
A13. Yes.
Q14. Now, during your employment with Frederick [fol. 649] Bros. did you become acquainted with the orchestras that that corporation booked?
A14. I did.
Q15. That is, you knew something about their history?
A15. I did.
Q16. And their quality of music?
A16. Yes.
Q17. Did you have occasion to solicit engagements from time to time for the orchestras?
A17. Yes.
Q18. And what types of establishments did you solicit for that purpose?
A18. Ballrooms, and hotels, and theatres; in fact, anyone using music.
Q19. Would that sometimes be college classes?
A19. Yes.
Q20. What about American Legion dances?
A20. As I say, anyone that was interested in having bands.
Q21. And civic organizations?
A21. That is right.

Q22. And in soliciting such engagements, did you follow the practice of telling the organization something about the orchestra?

[fol. 650] A22. Yes, we gave them selling points.

Q23. Something about its quality, and so forth, of its music?

A23. That is right.

Q24. What can you tell us, Mr. Kayser, as to whether Tiny Hill and his orchestra were one of the orchestras which you became familiar with in your work for Frederick Bros.?

A24. Well, that he was under management of Frederick Bros., and I handled a lot of his bookings—not all of them, most of them.

Q25. Can you tell us if you know when it was that Tiny Hill's orchestra was first organized?

A25. I don't know that; I know he came with Frederick Bros. because I came with them; he signed a management contract, I think it was in April of 1939—a five years management contract.

Q26. And you do know that that orchestra had been in existence sometime before that?

A26. Oh, yes.

Q27. Is that right?

A27. I do know that.

Q28. Would you say, two or three years?

A28. Yes.

Q29. Possibly longer?

[fol. 651] A29. Possibly, yes.

Q30. You say that that management contract was about five years in leng...? A30. Yes.

Q31. From some time in 1939?

A31. I think, as I say, April, 1939, to April, 1944.

Q32. Do you know whether the side men in Tiny Hill's orchestra were parties to that contract?

A32. To Frederick Bros. management contract?

Q33. Yes.

Mr. Cohen: I object to that question as calling for a legal conclusion. The witness can state who the signatories were, but the question of who is a party to the contract is a legal matter.

By the Witness:

A33. I don't, no. The side men are never a part of a management contract, the individuals.

By Mr. Roberts:

Q34. Their signatures did not appear on the contract?

A34. No. Now, I have never seen the management contract, all I know is that—

Q35. Customarily—

[fol. 652] Mr. Cohen: I object to the testimony, on the ground that the witness has not shown himself qualified in regard to this particular contract; and furthermore, on the ground that the contract will speak for itself—not the best evidence.

By Mr. Roberts:

Q36. You have, however, seen the type of management contract that was used generally, while you were there, have you not? A36. Yes.

Q37. And what was the custom as to the side men, whether their signatures appear there?

Mr. Cohen: I object to any contract, as immaterial and irrelevant to the issues in this case.

By the Witness:

A37. The side men's signatures are never on a management contract.

By Mr. Roberts:

Q38. You never saw one? A38. I never saw one.

Q39. That was on? A39. No, I did not.

[fol. 653] Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Plaintiffs' Exhibit "O" is a true and correct photostatic copy of the contract for the management of Tiny Hill and his orchestra, at the Crystal Ballroom, at Dubuque, Iowa, dated July 7, 1941; that said exhibit shall be treated for all purposes the same as though it were the original contract of which it is a photostatic copy, and may be offered in evidence without further identification, subject only to the objection that it is irrelevant and immaterial.

Is that all right?

Mr. Wilson: Yes.

Mr. Cohen: Yes.

Mr. Roberts: Will you mark this as Plaintiffs' Exhibit "O"?

(The document in question was accordingly marked Plaintiffs' Exhibit O for identification, as directed.)

By Mr. Roberts:

Q40. I will hand you what the reporter has marked, Plaintiffs' Exhibit "O", and ask you if you recognize that contract, of which the exhibit is a photostatic copy. (Hand-
[fol. 654] ing document to witness.)

A40. I do.

Q41. That is a contract for an engagement by Tiny Hill and his orchestra on September 28, 1941, at the Crystal Ballroom at Dubuque, Iowa?

A41. It is.

Q42. Does your signature appear any place on the contract of which Plaintiffs' Exhibit O is a photostatic copy?

A42. Yes, in the righthand corner; also in the receipt of deposit.

Q43. The receipt of deposit appears in the words, "$125.00 deposit received. Joe Kayser",

is that right?

A43. That is right.

Q44. What can you tell us as to whether you booked that engagement? A44. I did.

Q45. Do you recognize the form of contract of which Plaintiffs' Exhibit O is a photostatic copy, as any particular form? A45. Form "B".

Q46. That is the Form "B" of the American Federation of Musicians?

A46. That is the Form "B" of the American Federa-
[fol. 655] tion of Musicians.

Q47. What can you tell us, Mr. Kayser, as to whether the Crystal Ballroom at Dubuque, Iowa, could have obtained the services of Tiny Hill and his orchestra for September 28, 1941, through Frederick Bros., through the use of any other form of contract?

A47. They could not.

Q48. Going back to the recital appearing thereon, "$125.00 deposit received",

state what happened to that, if you know, so far as Frederick Bros. was concerned?

A48. They had an escrow deposit account in the bank for deposits.

Q49. And that money would be put in that account?

A49. That money would be put in that account, and on the books Tiny Hill would be given credit for $125.00 received in Dubuque, Iowa, for that particular date.

Q50. And then would some charges be made against that account on the books, for commission?

A50. Commission would be deducted.

Q51. And some expense, possibly?

A51. Possibly.

Q52. If any balance remained, to whom was it paid?

[fol. 656] A52. Tiny Hill.

Q53. What can you tell us as to whether any individual side man of Tiny Hill's orchestra ever gave you a written power of attorney, or other instrument in writing, signed by him, authorizing you to book and contract an engagement for him? A53. No, no side man.

Q54. Ever gave you such a power of attorney?

A54. No.

Q55. Nor other instrument in writing? A55. No.

Q56. Did you ever have an oral conversation with any side man of Tiny Hill's orchestra, with reference to your booking and contracting engagements for him?

A56. No.

Q57. That is, you didn't have any conversation with any side man? A57. No.

Q58. With reference to that matter?

A58. I did not; no, sir.

Q59. What can you tell us as to whether any of the side men of Tiny Hill's orchestra ever signed and filed with Frederick Bros. Corporation, a written power of attorney, or instrument in writing, authorizing Frederick Bros. to book and contract engagements for them?

[fol. 657] A59. I don't know of any.

Q60. You don't know of any? A60. No.

Q61. Normally, such a power of attorney would come to your attention, wouldn't it? A61. Yes.

Q62. In the position you occupied with the company?
A62. That is right.

Mr. Roberts: I will offer in evidence Plaintiffs' Exhibit "O".

No objection to that, I take it?

Mr. Wilson: No.

Mr. Cohen: No.

(Said document was accordingly received, marked Plaintiffs' Exhibit "O", certified under the name and signature of the Notary and Commissioner, duly made a part of this deposition and returned herewith, the same being in words and figures as follows, to-wit:—)

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Contract Blank

FREDERICK BROS. MUSIC CORPORATION

520 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS

THIS CONTRACT for the personal services of musicians, made this SEVENTH day of JULY 194 1

between the undersigned employer (hereinafter called the employer) and Eleven (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the persons' services of the employees as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of TINY HILL according to the following terms and conditions:

Place of employment CRYSTALL BALLROOM, DUBUQUE, IOWA

leadership of TINY HILL, according to the following terms and conditions

Place of employment CRYSTALL BALLROOM, DUBUQUE, IOWA

Date(s) of employment ~~September 28, 1941~~ $125 deposit received

Hours of employment 9 to 1

Price agreed upon $ ~~250.00 - privilege 60%~~ (Terms and amount)

To be paid Deposit required $125 - balance payable September 28, 1941
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer ROY BARTEL

Street Address CRYSTALL BALLROOM

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartel

Accepted Leroy Holl
(Orchestra Leader)

By
(Representative of Employer)

FORM B
(Printed in U.S.A.)

Plaintiffs' Exhibit "O" attached to Deposition.

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Tiny Hill (Leader)	89	325-14-4584	$
Melvin Mountjoy	89	325-14-4582	
F. C. Patterson	20	521-05-7342	
R. V. Schreier	798	325-14-4577	
Robert Arader	798	332-10-7111	
Dermit Coffeen	798	325-14-4578	
Norman Maxwell	183	345-03-9515	
Ralph Richards	20	523-07-0030	
Robert Walter	26	325-14-5950	
Lloyd Mc Cann	25	420-07-9505	
Russ Phillips	200	437-10-5215	
Bob Freeman	Vocalist	260-07-7566	

Plaintiffs' Exhibit "C" attached to Deposition.

[fol. 660] By Mr. Roberts:

Q63. What can you tell us, Mr. Kayser, as to whether Buddy Fisher and his orchestra was another orchestra with which you became familiar while you were with Frederick Bros. Corporation?

A63. I handled some of the bookings of that orchestra.

Q64. Do you know approximately when it was that Buddy Fisher's orchestra was organized?

A64. No, I do not.

Q65. Was it organized before you came to Frederick Bros.?

A65. Well, that particular orchestra?

Q66. Yes.

A66. I don't know—these leaders have orchestras, and they disorganize, and they organize again—I don't know.

Q67. You don't know as to this one?

Mr. Wilson: I move to strike the voluntary statement.

Mr. Roberts: I will agree that it may go out of the record.

Mr. Cohen: I don't agree!

Mr. Roberts: I will agree with counsel for the intervener, that it may go out of the record.

[fol. 661] Mr. Cohen: I won't agree; I want it to stay in the record.

Mr. Roberts: Will you read his answer back?

(The record as above recorded was read by the reporter.)

Mr. Roberts: I move to strike that part of the witness' answer, beginning with, "These leaders", as a volunteer statement of the witness not in response to the question asked.

Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Exhibit "P" is a true and correct photostatic copy of the contract for the engagement of Buddy Fisher and his orchestra, at the Crystal Ballroom, at Dubuque, Iowa, dated November 6, 1941; that said exhibit shall be treated for all

purposes the same as though it were the original contract of which it is a photostatic copy, and may be offered in evidence without further identification, subject only to the objection that it is irrelevant and immaterial.

[fol. 662] Is that all right?

Mr. Cohen: Yes.

Mr. Wilson: Yes.

Mr. Roberts: Will you mark this please as Exhibit P?

(Said document was accordingly marked Plaintiffs' Exhibit P for identification, as directed.)

By Mr. Roberts:

Q68. I will hand you what the reporter has marked as Plaintiffs' Exhibit P, and ask you if you are familiar with the contract of which the exhibit is a photostatic copy? (Handing document to the witness.)

A68. I am.

Q69. Is that a contract for engagement by Buddy Fisher and his orchestra at the Crystal Ballroom at Dubuque, Iowa, on November 23, 1941? A69. It is.

Q70. Does your signature appear any place on that contract? A70. In the righthand corner.

Q71. Also, do you find any other entries in your handwriting?

A71. In the receipt of the deposit.

[fol. 663] Q72. Of $50.00?

A72. Yes.

Q73. The date of that contract is November 6, 1941?

A73. That is right.

Q74. Do you know how long it was prior to that that Buddy Fisher's orchestra was in existence?

A74. Previous to this?

Q75. Yes, previous to that date?

A75. I do not, no.

Q76. Would you say, a year?

Mr. Cohen: The witness has answered that he didn't know; I think further questions are argumentative.

By Mr. Roberts:

Q77. Was it organized for this particular engagement?

A77. It was.

Q78. Answer the question: Was it just organized for this one engagement?

A78. Oh, no; it was organized previous to that engagement.

Q79. He had played other engagements before this; you know that, don't you?

A79. Yes.

Q80. And this $50, was that handled in the same man-
[fol. 664] ner as the deposit on Tiny Hill's contract?

A80. It was.

Q81. Put in an escrow account in the bank, and then credited to his account on the books of the corporation?

A81. Yes.

Q82. And the commissions and expense due the company were deducted?

A82. That is right.

Q83. And any balance was paid to Buddy Fisher?

A83. That is right.

Q84. You mentioned that Buddy Fisher and his orchestra played other engagements; can you tell us what type of establishments his orchestra played at?

A84. Hotel engagements, and one-night engagements.

Q85. That would be one-night engagements or what?

A85. Ballrooms or college parties.

Q86. And clubs?

A86. Yes.

Q87. And lodges?

A87. Yes.

Q88. When you were booking engagements by Buddy Fisher and his orchestra, did you follow the practice of telling the respective music users something about the
[fol. 665] orchestra?

A88. Gave them a sales talk, that is right.

Q89. And something about its special quality of music?

A89. That is right.

Q90. You followed that practice during 1941, I take it?

A90. That is right.

Q91. What can you tell us as to whether any of the side men of Buddy Fisher's orchestra ever gave you a power of attorney signed by him authorizing you to book and contract engagements for him?

A91. They never did, the side men.

Q92. None of the side men ever gave you such a power of attorney?

A92. No.

Q93. Or any instrument in writing; isn't that right?

A93. That is right.

Q94. Did you ever have a conversation with any of the side men with reference to your acting for them in booking engagements?

A94. I did not.

Q95. Or in entering into contract for engagements?

A95. No.

[fol. 666] Q96. Never had such a conversation with them?

A96. No.

Q97. Do you recognize the form of contract of which Plaintiffs' Exhibit "P" is a photostatic copy, as another Form "B" contract?

A97. It is a Form "B" contract of the American Federation of Musicians.

Q98. What can you tell us as to whether the Crystal Ballroom at Dubuque, Iowa, could have obtained the services of Buddy Fisher and his orchestra for November 23, 1941, through Frederick Bros. Music Corporation, through the use of any other form of contract?

A98. They could not.

Q99. And by "they", you mean the owners of the ballroom?

A99. That is right.

Mr. Roberts: I will offer in evidence Plaintiffs' Exhibit "P".

Mr. Wilson: No objection.

Mr. Cohen: No objection.

(Said document was accordingly received, marked Plaintiffs' Exhibit "P", certified under the name and signature of the Notary and Commissioner, duly made a part of this [fol. 667] deposition and returned herewith, the same being in words and figures as follows, to-wit:—)

Contract Blank No 569

FREDERICK BROS. MUSIC CORPORATION

520 NORTH MICHIGAN AVENUE

CHICAGO, ILLINOIS

THIS CONTRACT for the personal services of musicians, made this 6 day of NOVEMBER, 194 1

between the undersigned employer (hereinafter called the employer) and ELEVEN-ONE VOCALIST musicians (including Leader) (hereinafter called employee(s)) represented by the undersigned representative

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BUDDY FISHER, according to the following terms and conditions:

Name and Address of Place of Engagement CRYSTAL BALLROOM, DUBUQUE, IOWA

Date(s) of Employment NOVEMBER 23, 1941

Hours of Employment 9pm to 1am

$50 — deposit received

Plaintiffs'

PRICE AGREED UPON $ 100.00 GUARANTEE; PRIVILEGE 50%
(Terms and Amount)

To be paid $50.00 DEPOSIT, BALANCE NOVEMBER 23, 1941
(Specify When Payments Are To Be Made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer ROY BARTELS

Street Address P. O. BOX 371

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartels

Accepted Buddy Fein
(Orchestra Leader)

By
(Representatives of Employees)

FORM B
Printed in U. S. A.

Plaintiffs' Exhibit "P" attached to Deposition.

489

NAME OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Buddy Fisher (Leader)	12	508-09-9482	11.55
George Veal	413	400-12-2035	5.50
Jack Moore	512	512-12-0266	5.50
George Drew	512	521-24-6143	5.50
Benny Hawkins	655	262-01-3018	5.50
Paul Hadsock	655	267-01-3374	5.50
Harry Webster	396	524-03-5839	5.50
Joe McInerney	512	400-12-2157	5.50
Bill Ormiston	512	432-01-0004	5.50
Bud Palzer	512	509-18-2214	5.50
Nicholas Musolino	265	512-05-8238	5.50
Warren Burrett	512	507-12-6790	5.50
Gypsy Edwards	Vocalist	381-03-0035	6.00

Plaintiffs' Exhibit "P" attached to Deposition.

[fol. 670] Mr. Roberts: I believe that is all Gentlemen.

Cross-Examination.

By Mr. Cohen:

Q100. Mr. Kayser, I believe you stated that Plaintiffs' Exhibits "O" and "P" were entered into by the plaintiffs in this action for the services of Tiny Hill, and Buddy Fisher, respectively, and that you signed both of those contracts; is that correct?

A100. That is correct.

Q101. Now, were there any other contracts entered into for those engagements on September 28, 1941, and November 23, 1941?

A101. No, those are the only contracts that were entered into for those particular dates.

Q102. Did those contracts represent the entire agreement between the parties for the engagements on those dates?

A102. They did.

Q103. Now, Mr. Kayser, do you know who the members of those orchestras were on these respective dates?

A103. No, I do not.

Mr. Cohen: No further questions.

[fol. 671] Mr. Wilson: I have no questions.

Mr. Roberts: I have no further questions.

(End of deposition.)

Mr. Fuller: (Commissioner): Mr. Witness, counsel have stipulated to waive the reading and signing of your deposition. Do you wish to waive the reading and signing of your deposition?

The Witness: Yes, I waive the reading and signing of my deposition.

The reading of his foregoing fully transcribed deposition, and the signing thereof by the said witness, Joseph L.

Kayser, were by stipulation by and between counsel for the parties, and by the witness, duly waived:

ROY E. FULLER,
Notary Public, Cook County, Illinois.

My Commission expires June 7 A. D. 1947.

(Seal) Commissioner

[fol. 672] Mr. Cohen: I want to recall Mr. Breyley for a moment.

And the said

JAMES K. BREYLEY, of lawful age, having been by me, the said Roy E. Fuller, as Notary Public and Commissioner, as aforesaid, heretofore first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, was further examined upon oral interrogatories, and he did thereupon further depose, testify and say as follows, viz.:

Cross-Examination (Resumed)

By Mr. Cohen:

Q119. Mr. Breyley, you testified on direct examination that Plaintiffs' Exhibit "L" was a true copy of the contract which you signed for the engagement of the orchestra under the leadership of Bill Carlsen, at Crystal Ballroom, on August 17, 1941; is that correct?

A119. That is right.

Q120. Now, was any other agreement entered into with Crystal Ballroom at that time?

[fol. 673] A120. No.

Q121. Does Plaintiffs' Exhibit "L" represent the entire agreement, as you understand it, for the services of those musicians?

Mr. Roberts: Objected to as irrelevant and immaterial, the witness not shown competent.

By The Witness:

A121. Yes.

By Mr. Cohen:

Q122. There was no modification or alteration of that agreement by Crystal Ballroom, so far as you know; is that correct?

A122. That is right.

Q123. Now, I call your attention to Plaintiffs' Exhibit M: Did you testify that you had signed that contract for the services of Griff Williams, at Crystal Ballroom, on September 1, 1941?

A123. Yes.

Q124. Was there any other contract executed for the services of that aggregation on that date?

A124. No.

Q125. Are you able to state, Mr. Breyley, that Plaintiffs' Exhibit "M" represents the entire agreement covering the services of the orchestra under the leadership of Griff [fol. 674] Williams, for the engagement at Crystal Ballroom on September 1, 1941?

A125. That contract was the only record of any agreement, but when we sell a band to a customer, we sell them certain things that are frequently not in the contract; in other words, we guarantee—or agree to give them certain publicity, of certain people, and so forth; you see, that would not appear, that is why I say that is a tough question to answer.

Q126. Well, what terms other than these?

A126. That represents the terms of the money; that represents the hours, and the number of people; but in addition to that there are other things that you have—either in letter, or verbally, when you are selling the date, which explains what is in that thing, and so forth.

Q127. Was there anything so far as the relations between the Crystal Ballroom and the musicians, other than what was stated in this contract?

Mr. Roberts: Objected to as calling for the opinion and conclusion of the witness, and the witness not shown competent.

Mr. Cohen: Answer that.

By The Witness:

A127. Between the side men in the band, and the em- [fol. 675] ployer, the Crystal Palace?

By Mr. Cohen:

Q128. Did you ever sign any agreement on behalf of Griff Williams which was at variance with any of the terms of Plaintiffs' Exhibit "M"?

Mr. Roberts: Objected to, as confusing.

By The Witness:

A128. On that date? No.

By Mr. Cohen:

Q129. Yes. A129. No.

Q130. For that engagement?

A130. No.

Q131. In other words, is it correct to state that no agreement was entered into by Crystal Ballroom and Music Corporation of America, which altered, varied, or contradicted any of the terms of Plaintiffs' Exhibit "M"?

Mr. Roberts: Wait a minute! Read that question.

(The pending question as above recorded was read by the reporter.)

By Mr. Cohen:

Q131. (Continuing) Is that a fair statement?

A131. Well, it is, and it is not.

[fol. 676] Q132. Well, in what respects isn't it?

A132. Well, for example, I don't remember now where Griff Williams was playing at the time that I sold that job, but we would tell the customer on the phone where the band was playing, and where they were coming from, what air time they had, and so forth, which is a verbal part of the contract, because he is buying it on that.

Q133. Well, will you read Plaintiffs' Exhibit "M" and tell us whether you ever agreed to anything at variance with any of the terms set forth in that contract? (Handing document to the witness.)

A133. Well, we never agreed to anything at variance with that, no.

Mr. Cohen: That is all.

Cross-Examination.

By Mr. Wilson:

Q134. I believe you stated a moment ago that there were certain letters you sent to them explaining certain

things covered by the agreement: Could you elucidate on that a little further?

A134. Well, I wouldn't say that there was a letter on that particular job.

Q135. No?

[fol. 677] A135. We would send them a letter describing the band, describing the places they had played, and the number of people, and so forth—or, you might do it on the phone, you might send it by wire, you might send a circular.

Cross-Examination.

By Mr. Cohen:

Q136. Is it correct—

Mr. Roberts: Who is examining?

Mr. Cohen: May I ask a question?

Mr. Wilson: I yield.

By Mr. Cohen:

Q136. Is it correct that all those matters were preliminary to the execution of this contract, Mr. Breyley?

A136. Yes.

Cross-Examination.

By Mr. Wilson:

Q137. Now, would you say that a letter providing for publicity of certain other persons—I mean, sometimes you would agree to publicize—

A137. A vocalist.

Q138. I didn't hear you.

[fol. 678] A138. Perhaps a vocalist.

Q139. I mean, you agreed to publicize?

A139. No, we don't publicize anyone. We furnish the publicity.

Q140. You furnish the publicity for certain members of the orchestra; is that correct?

A140. That is right.

Q141. That would be certain side men of the orchestra?

A141. If they are singers.

Q142. If they are known as a feature player in an orchestra?

A142. A singer or an entertainer.

Q143. You would have publicity on those?

A143. Yes.

Q144. Is that correct?

A144. Yes.

Mr. Wilson: That is all.

Redirect Examination.

By Mr. Roberts:

Q145. When you mention about this publicity—furnishing it for the featured entertainers, you mean you were furnishing it about him, don't you?

A145. Yes.

[fol. 679] Q146. That is, he was not paying you for sending out that publicity?

A146. No, no, that is part of the orchestra.

Q147. It is part of your service under your management contract with Griff Williams; isn't that right?

A147. Yes, that is right. We sent publicity on Griff Williams, and probably a girl singer, or any featured vocalist or entertainer in that band.

Q148. And who pays the expense of that?

A148. Music Corporation of America.

Q149. And you are reimbursed for that under your management contract, out of the commission?

Mr. Wilson: Wait a minute! I will object to that.

Mr. Roberts: I will withdraw it.

(Question withdrawn.)

By the Witness:

A149. We are not reimbursed at all; that is part of our service.

By Mr. Roberts:

Q150. Part of your service?

A150. We furnish that for our commission.

Q151. What was that last?

A151. For our commission.

[fol. 680] Q152. Griff Williams is the only one that pays you a commission, isn't he;—

Mr. Cohen: I object to that.

By Mr. Roberts:

Q152. (Continuing)—in the case of his band; isn't that correct?

Mr. Cohen: I object to that question as calling for a legal conclusion.

By Mr. Roberts:

Q152. (Continuing) Who paid you commission on this engagement?

Mr. Wilson: I am going to object to that.

By the Witness:

A152. Griff Williams.

By Mr. Roberts:

Q153. You also sent out publicity material on Bill Carlsen's orchestra, didn't you? A153. Yes.

Q154. And that goes to the establishment that is using the orchestra? A154. That is right.

Mr. Roberts: I believe that is all on redirect.

[fol. 681] Recross Examination.

By Mr. Cohen:

Q155. Now Mr. Breyley, when you stated that Griff Williams would pay you for the publicity which you furnished purchasers of the music, concerning side men—featured side men, and vocalists in the orchestra, will you describe what was the procedure by which that payment was made?

A155. There was no payment made from Griff Williams for publicity.

Q156. How is that payment made?

A156. There was no payment made for publicity. We shipped pictures and mat stories to the customer on a band, and we absorb the cost; we don't charge any band for publicity costs.

Q157. And you regard that as part of the service?

A157. As part of our service.

Q158. For which a commission is subtracted from the amount you receive from the purchaser; isn't that correct?

A158. Your commission is figured on your contract price; all we take from the band is the commission; we don't get any money from publicity.

Recross Examination.

By Mr. Wilson:

[fol. 682] Q159. Let me ask this: I mean, the publicity comes from just the general revenue, whoever pays?

A159. That is right. We have a regular Publicity Department which publicizes all of our attractions.

Q160. There is no specific charge against any particular person with whom you might have a contract?

A160. Oh, no. We don't even keep a record of what one costs us.

Mr. Wilson: No further questions.

Redirect Examination.

By Mr. Roberts:

Q161. One further question: In your answers to cross-examination questions, I think you referred to the Crystal Ballroom as an "employer": You were not trying to express any legal opinion? A161. No.

Q162. As to who was the employer of the orchestra?

A162. No, we call the men who buy attractions, "customers", "employers".

Q163. It has no legal significance?

A163. No, none whatsoever, any more than you could call a man who is operating a ballroom as a legitimate business, a promoter, and that is what we call him, it [fol. 683] is just an attraction.

Mr. Roberts: That is all.

Mr. Cohen: That is all.

Mr. Wilson: No further questions.

(End of deposition.)

Mr. Fuller (Commissioner): Mr. Witness, counsel have stipulated to waive the reading and signing of your deposition. Do you wish to waive the reading and signing of your deposition?

The Witness: Yes, I waive the reading and signing of my deposition.

[fol. 691] The Court: By agreement the intervener is placing the witness on the stand out of time and out of order.

OSCAR F. HILD, called as a witness on behalf of the Intervener, and first duly sworn by the Clerk, testified as follows:

Direct Examination.

By Mr. Joseph A. Padway:

Q. Your full name is Oscar Hild? A. Oscar F.

Q. Where do you live? A. Cincinnati, Ohio.

Q. What is your business?

A. President of the Musicians Association, Cincinnati, No. 1, and member of the International Executive Board of the American Federation of Musicians.

Q. That means you are an officer of the Board of the International organization, the parent organization of the Local organizations? A. That is true.

Q. And it is international because with it are affiliated the Unions of Canada?

A. That is true.

Q. That is the reason it is called and known as the In-[fol. 692] ternational Union; is that correct? A. Yes.

Q. You are President of Local Board No. 1, and that is in Cincinnati? A. That is correct.

Q. How long have you been a musician?

A. About thirty years—thirty-two years.

Q. How long have you been a member of the Union?

A. About the same length of time.

Q. Were you a member of the Board in 1941, of the General Executive Board of the International Union?

A. Yes, I was.

Q. You are familiar with what went on in this meeting? A. Yes.

Q. In 1941 were meetings held by the Executive Board?

A. There were.

Q. Were you present at any of the meetings at which action was taken respecting the so-called Form B contract that has been discussed so much during this trial?

A. I was present.

Q. Do you recall when that Form B contract was adopted as a form to be used by the various leaders of orchestras contracted for engagements in this country?

A. The meeting lasted from some time in January un [fol. 693] til some time in late February.

Q. Where was it held? A. Miami, Florida.

The Court: That would be 1941?

A. '41.

Q. At that meeting was any action taken with respect to Article X, Section 29? Do you recall which Article I refer to?

A. Article X, Section 29, which refers to the rights and duties of orchestra members, dance orchestra members.

Q. They contract not with the establishment but with the fellow members? A. Yes.

Q. What action was taken respecting that?

A. Positive action was taken to import to the members, all of them, that they were to change their method of operation in order that thereby the doubt may be removed regarding the employer and employe status of members.

Q. How was the action taken; was it by action before the Board or by the President requesting the Board to approve of his proclamation?

A. The President of the Federation who was in attendance at the Board meeting submitted this change, the general matter of change of law. Our law provides that [fol. 694] the Executive Board does not have the authority to change the law, consequently the Board discussed it at length, and then directed the President, under his powers in Article I, Section 1 of the Constitution, which gives to him the exclusive right to change laws when an emergency exists, but with the general agreement that those powers will be exercised only in connection with the advice of the Executive Board. The Executive Board thereupon instructed the President to promulgate and issue the necessary rulings with reference to our men, our members.

Q. Did the President promulgate those rules?

Mr. Charlton: Objected to as not the best evidence, and calling for the opinion and conclusion of the witness.

Mr. Padway: I am just asking, did he promulgate the ruling.

Mr. Charlton: I withdraw the objection.

A. The President promulgated the ruling.

Q. Was it approved by the Executive Board?

A. It was.

Q. Was that ruling under the power you have mentioned in your statment of Article I, Section 1?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness.

[fol. 695] The Court: Sustained. (Intervener excepts).

Q. I am asking in the discussion of the meeting was anything said of the powers under which Mr. Petrillo, that is the man who made the ruling? A. Yes.

Q. Mr. Petrillo discussed it?

A. The Executive Board is cognizant of the fact that the Executive Board, under our laws does not have the power to execute such ruling, promulgate such rules and laws, and the power is distinctly given to the President of the Federation of Musicians, and so at the direction of the Executive Board the President was instructed to promulgate such laws forthwith.

Q. What section of the Constitution gives the President that right? A. Article I, Section 1.

Q. Is that the power that he was presumed to act under at that time? A. Yes.

Q. What was the ruling—did it take any concrete form?

A. Yes. The concrete form was that from a given point on all members of the American Federation of Musicians were in fact ordered to divest themselves of any previous right imported as employers and were told that there-[fol. 696] after they must divest themselves of the inherent right of employers and transfer those rights to the purchasers of their services.

Q. What form did it take?

A. In a letter addressed to the members of the Home Local, and a letter addressed to the booking agencies.

Q. Was it presented in the form of a contract known as Form B? A. Yes.

Q. Did a Form B contract accompany the letter?

A. Form B. accompanied the letter, and they were delivered to each Local, and the booking agencies.

Q. Was that sent to all Locals? A. Every one, yes.

Q. Is that letter pleaded by the complainant and set forth as an exhibit of the plaintiff?

A. You showed me a letter some days ago. I admit it is.

Q. I mean it is a copy attached to the complaint; to the complaint is attached this letter?

A. Yes, it is in the pleading.

Q. I will ask you to look at this letter where it says, reading from the exhibit:

To all Locals of the American Federation of Musicians:

[fol. 697] Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with Grand Opera Companies and Symphony Orchestras.

This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the Social Security laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

That is correct?

A. Yes.

Q. You will notice it says in the letter "adopted by the International Executive Board." Just what do you mean by that; what action did they take?

A. President Petrillo came before the Executive Board with this general matter of advisability of changing our laws. The Executive Board being in session for some two and a half weeks went thoroughly into the matter and constructed a contract and thereafter directed the President to promulgate necessary laws effecting that contract's adoption. It must be understood that up to this time there were about 128 different contract forms in use. It was now our purpose to have all members subject to engagement under only one form of contract. This Form B is the form adopted.

[fol. 698] Q. Was that adopted at that time for the promulgation of a new rule by the President? A. Yes.

Q. And was the method used by making that known in a letter to the Locals? A. That is true.

Q. And had this provision of Article X, Section 29, become inoperative?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness; not the best evidence; and contrary to the provisions of the By-Laws and the letter referred to, and in no manner binding upon the plaintiffs.

Mr. Padway: I will withdraw the question.

Q. When did the rule that you have just said was promulgated and approved by the Executive Board by the President changing Section 29, Article X, go into force and effect?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, that a rule, or what constituted a rule, ever did go into force and effect, immaterial and irrelevant.

The Court: Sustained. Those are matters of record. (Intervener excepts).

Q. All right. Let me put it this way: The date set forth [fol. 699] in that letter to the Locals is the date when Form B became operative? A. June 1st.

Q. It has been testified to here that the band leaders and their orchestras contracted for employment through the medium of booking agents. Was that the system in vogue in 1941? A. Yes.

Q. Was it in vogue before that?

A. It has always been in vogue in our business, it seems.

Q. The booking agency is an employment agency?

A. It is no different from an employment agency.

Q. No different than a private employment agency?

A. I don't think so.

Q. They are paid a commission?

A. They are paid a commission for their services in obtaining engagements.

Q. For the amount stipulated in the contract?

A. That is true. They appear almost solely in the dance field.

Q. And some in the movie stars?

A. Yes, movie stars, that is true.

Q. They book them too? A. Yes.

[fol. 700] Q. Now you have heard mentioned here, because you have sat through the trial, the contract that was entered into by Moorhead, Menke, Lawson — do you recall those gentlemen? A. I do.

Q. I don't think you will disagree that this form of contract was used in all those engagements referred to?

Mr. Charlton: I think every engagement involved in this case, with the exception of the one which has been removed by payment of the amount claimed, is a Form B contract.

Q. Now I show you this Form B contract. You have heard it testified here in questions put by counsel to Mr. Menke and Mr. Moorhead and Mr. Lawson, those three gentlemen, that if a man was to be discharged they discharged the man. You heard that testimony, did you?

A. I did.

Q. You are familiar with this contract, are you?

A. Yes.

Q. Did you participate in the drafting of it? A. Yes.

Q. At the Miami meeting you have explained?

A. Yes.

Q. Now under the contract offered here, did Mr. Moor-
[fol. 701] head, Mr. Geer, have the right, and Moorhead the right to discharge?

Mr. Charlton: That is objected to as calling for the opinion and conclusion of the witness, and invading the province of the court in deciding one of the controversies in this case.

Mr. Padway: I would not have put that question at all except for this fact, and I have made myself clear to show the court so he may know why I am putting it, and if the court wants to adhere to the ruling I think we want an exception. In the complaint in this case the counsel specifically set forth that Form B and that language in Form B that the employer was at all times to have complete control of the services of the employe is ambiguous, and must be read as pertaining to results rather than methods and means. They pleaded that. They have put that in issue. Now here is a witness who drafted the contract and who can tell us whether Moorhead had the right of discharging. But this case has gone off, so far as the plain-

tiff is concerned, on what the leader did. He is the only one that did that, which is altogether beyond the issue, and that is why we have failed to cross-examine on that altogether; but under the contract, who has the right to do [fol. 702] that, that is the issue in this case. If they had pleaded no ambiguity, and if they had reached no so-called subterfuge it would be immaterial, but it is material now in view of what they have pleaded for this witness to state who has the right under Form B to discharge an employe. To put it in another way, does the establishment and the person who operates it have the right to discharge. It is very material and relevant to the question they have put. They have put the question, did you exercise the right to discharge to Mr. Moorhead. They put the same question to Mr. Lawson. They put the same question to Mr. Menke. All of them answered they did. But they abstained rather definitely from asking any of their witnesses, did you have the right, Mr. Geer, Mr. Bartels, did you have the right to discharge. Now I say it is our case to meet that subject of discharge, that it is relevant to find out whether the person that purchased the music had that right unless counsel will state they had that right, but if counsel is going to content that Mr. Bartels did not have the right, Mr. Geer did not have the right, that is relevant for me to ask of this witness, under the Form B contract, does the purchaser of the music, the man that signs the contract, have the right to discharge, and I say for that reason the [fol. 703] question is pertinent, and I make the offer.

Mr. Charlton: The same objection.

The Court: I am very well satisfied with my ruling, although I will be glad to have you offer your proof.

Mr. Padway: I will put the same question again.

The Court: No use putting the same question.

Mr. Padway: I thought it would be easier.

Q. Mr. Hild, under that contract, now I am referring to the contract that has been offered here in evidence, under Bartels' evidence, does Mr. Bartels have the right to direct the leader to discharge an employe?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness on a legal matter, the witness not

shown qualified, invading the province of the court, immaterial and irrelevant what this witness' opinion is, and not the best evidence.

The Court: Sustained. (Intervener excepts).

Q. Mr. Hild, under that contract is Mr. Moorhead, Mr. Menke, Doc Lawson, obliged to discharge an employe, a side man, upon request of the purchaser of the music?

Mr. Charlton: The same objection.

The Court: The same record. Sustained. (Intervener excepts).

Mr. Padway: Will it be understood that I put that question with respect to all those three individuals?

[fol. 704] The Court: I thought you did, but you can ask it.

Mr. Padway: The ruling would be the same?

The Court: Yes. (Interveners except).

Mr. Padway: It is understood, without going into great formalities that I am offering the proof with respect to those questions and making an offer to prove that Mr. Bartels, Mr. Geer, having these contracts with these band-leaders mentioned, did have the right of discharge, and did have the right to request persons to be hired. I want to have the court consider that I am making an offer to prove with respect to that, and it may be considered, and of course the court's ruling will naturally close it.

Mr. Charlton: To the offer the complainants object on the grounds stated in the last full objection.

The Court: Sustained. (Intervener excepts).

Q. In your capacity as officer of the International Union did you learn that certain band leaders took the position under Form B contract that they were not employer and were not obliged to pay the social security tax to the Government? A. Yes, sir.

Q. Did you learn that as a result of that objection on their part the question was submitted to the Bureau of Internal Revenue?

[fol. 705] A. I did.

Q. Did you learn that the Bureau of Internal Revenue thereupon examined Form B, examined the circumstances, and made rulings? A. Yes, sir.

Q. I now show you what purports to be a certified copy of a ruling made by the Treasury Department.

Mr. Charlton: Maybe we can stipulate on that.

Mr. Padway: May it be stipulated that Exhibit, Intervener's No. 1, which purports to be a certified copy of a ruling by the Treasury Department, Bureau of Internal Revenue, and addressed to the Stevens Hotel Corporation relating to the status of Mr. Heatherton, band leader, and working at that hotel, and that such status was with reference to or had in connection with the payment of the social security tax, and that this is a true copy of the ruling?

Mr. Charlton: It is conceded that the instrument is a true copy of the ruling and may be received in evidence for all purposes as if it was the original subject to the objection that it is incompetent, immaterial and irrelevant, and has no bearing on this case.

The Court: I will take it subject to the objection. I don't [fol. 706] know anything about that at the present time. (Plaintiffs except).

Int. Ex. 1
12-13-44
H E R

United States of America

FILED
DEC 13 1944
N. T. Reed
CLERK

TREASURY DEPARTMENT
WASHINGTON

December 7 , 19 44

URSUANT to the provisions of Section 661, Chapter 17, Title 28 of the States Code (Section 882 of the Revised Statutes of the United States), by certify that the annexed are true copies of copy of letter dated April 41, to Stevens Hotel Corporation, Chicago, Illinois, from Guy T. Helvering sioner; Contract dated January 28, 1941, between Stevens Hotel and Music ation of America.

e in this Department.

Intervenors Exhibit 1.
Filed in U. S. District Court December 13, 1944.

Interveners Exhibit 1.
Filed in U. S. District Court December 13, 1944.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Amos Holland

~~F. A. Birgfeld~~

Actg - Chief Clerk, Treasury Department.

Amos N W Barnes

Departmental Stock Form 2947

U. S. GOVERNMENT PRINTING OFFICE

Stevens Hotel Corporation,
Michigan Boulevard at Balbo Drive,
Chicago, Illinois.

Attention: Mr. J. A. Jones,
Resident Manager.

Sirs:

Reference is made to your letter dated March 19, 1941, in which you submit certain information requested by this office in connection with a determination of the status, for purposes of the taxes imposed by Subchapters A and C of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of Mr. Leo Heatherton and the musicians performing services under his direction at your establishment pursuant to a contract dated January 28, 1941.

You express the opinion in your letter that the legal relationship of employer and employee does not exist between the Stevens Hotel Corporation and Mr. Heatherton and the members of his orchestra. It is contended by you that Mr. Heatherton is an independent contractor, and your reasons for so believing are set forth.

Consideration has been given to the reasons set forth in your letter. However, it is noted that under the terms of the contract pursuant to which the orchestra is performing services, the Corporation engages the personal services of eight musicians and a girl vocalist under the leadership of Mr. Heatherton. The contract specifies the place where the engagement is to be performed, the dates of the engagement, and the lump-sum weekly payment for the services of the orchestra. It is expressly stated in the contract that the Corporation shall have complete control of the services to be rendered thereunder. It is also provided that Mr. Heatherton as leader shall distribute the amount received from the Corporation to the musicians in accordance with the list appearing on the reverse side of the contract. Such list shows the names of the members of

Filed in U. S. District Court December 13, 1944.
Intervenors' Exhibit 1.

AAC:RR:3

Stevens Hotel Corporation.

the orchestra, their social security account numbers, and their individual compensation. The contract is signed by a representative of the Corporation and by an employee of the Music Corporation of America, a booking agency, for Mr. Heatherton.

In view of the express terms of the contract it is clear that the Corporation has the right to exercise over Mr. Heatherton and the other members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, held that Mr. Heatherton and the other members of the orchestra are employees of the Stevens Hotel Corporation for purposes of the taxes in question.

Respectfully,

(Signed) Guy T. Helvering

Commissioner.

cc Collector,
Chicago, Illinois.

Interveners' Exhibit 1.
Filed in U. S. District Court December 13, 1944.

Contract Blank

AMERICAN FEDERATION OF MUSICIANS

Local Number 10

THIS CONTRACT for the personal services of musicians, made this [illegible] day of [illegible], 194[illegible]

between the undersigned employer (hereinafter called the employer) and [illegible] musicians (including Leader) (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of RAY HEATHERTON, according to the following terms and conditions:

Place of employment STEVENS HOTEL

Filed in U. S. District Court December 13, 1944.
Intervenors Exhibit 1.

Place of employment STEVENS HOTEL

Date(s) of employment Begin. Saturday, March 1st, 1941, to April 11, inclusive.

Price agreed upon $ $1050 weekly, which price includes transportation
(Terms and amount)

To be paid Weekly
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer STEVENS HOTEL By

Street Address Balbo and Michigan

City or State Chicago, Illinois

Phone

RECEIVED FEB 18 1941 OF MUS.

Accepted by Employer

Accepted MUSIC CORPORATION OF AMERICA.
(Corporate Leader)

By
(Representative of Employees)

B-3

FEB 19 1941

515

Interveners' Exhibit 1.
Filed in U. S. District Court December 13, 1944.

NAMES OF EMPLOYEES	S. S. NUMBER	WAGES
RAY HEATHERT (Leader)	113-01-4532	$119.22
CONRAD SILKE	113-07-2240	96.12
ART LEE	092-05-6728	96.12
ART KERR	072-12-6[illegible]	89.52
CARMINE FURIA	089-05-3186	89.52
VINCENT BISHOP	095-14-3970	89.52
~~LARRY MCLOUGHLIN~~	054-07-[illegible]684	96.12
ED GRIFFIN	212-14-3609	89.52
BILL TELFER	113-04-9682	89.52
JUDY CLARK	103-12-7628	50.00
Transportation, commission, miscellaneous.		144.82
		TOTAL $1050

[fol. 712] Mr. Padway: The same with reference to Interveners Exhibit No. 2. I offer that, and that purports to be a ruling from the Commissioner of Internal Revenue.

Mr. Charlton: The same objection, and the same concession.

The Court: The same ruling. (Plaintiffs except).

United States of America

TREASURY DEPARTMENT

WASHINGTON

FILED

DEC 13 1944

N. T. Reed

CLERK

December 7, 1944

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the d States Code (Section 882 of the Revised Statutes of the United States), by certify that the annexed are true copies of letter dated October 9, (with copy of contract attached), to Commissioner of Internal Revenue, gton, D. C., from William J. Korth, Collector of Internal Revenue, Salt City, Utah, in re: Jerry Jones, DBA Rainbow Randevu Ballroom; Copy of r dated October 18, 1944, to Collector of Internal Revenue, Salt Lake City, from Victor H. Self, Acting Deputy Commissioner, in re: Rainbow Randevu oom.

le in this Department.

Filed in U. S. District Court December 13, 1944.

1944.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Ann Holland

~~F. A. Birgfeld~~

Actg Chief Clerk, Treasury Department.

Departmental Stock Form 2347

U. S. GOVERNMENT PRINTING OFFICE

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

SALT LAKE CITY 1, UTAH

OFFICE OF THE COLLECTOR
DISTRICT OF UTAH

IN REPLYING REFER TO

EmT:PBM

October 9, 1944

Commissioner of Internal Revenue
Washington 25, D. C.

Attention: Employment Tax Activities

In re: Jerry Jones, DBA
Rainbow Randevu Ballroom
Salt Lake City, Utah

This office has received an OAR 7010 letter from the parallel office of the Social Security Board, Salt Lake City, Utah, involving the employment of James L. Montgomery, deceased, account number 073-01-6364, musician with Les Brown's orchestra in connection with the above orchestra's engagement at Jerry Jones Rainbow Randevu commencing January 27th, and continuing for a period of two weeks in the year 1944. This office also has a communication from the Collector of Internal Revenue at Los Angeles, California, in which Deputy Collector C. L. Hendrix of the 6th Dist. of California has transmitted the completed Form SS-1a for the 9-30-43 quarter against the above employer involving the engagement of Jan Garber's orchestra for the week of August 6, 1943.

Filed in U. S. District Court December 13,

Intervenors' Exhibit 2.

The taxpayer contends that both of these orchestra leaders was the employer in both of these engagements. He has submitted a statement to support his contention with both of these orchestra leaders, and also a copy of the contract with both orchestra leaders, a copy of the expense schedule of both engagements, together with copies of two letters from the Bureau of Internal Revenue, the first dated May 7, 1941, symbol A:C:RR:3-C and the second, dated May 15, 1943, symbol A:C:RR:3-C. The [redacted] letters pertained to the status of orchestra leader, Sonny Dunha[redacted] operating at the same ballroom.

These instruments are being transmitted herewith for the purpose of securing from the Bureau, a determination of the status of Jan Garber and Les Brown, orchestra leaders in their engagements at the Jerry Jones Rainbow Randevu Ballroom under the Federal Insurance Contributions Act and the Federal Unemployment Act.

The communication from the Collector in the 6th District of California, advises that the Bureau has ruled Jan Garber to be an employee. This office is not in possession of that ruling.

William J. Korth,
Collector of Internal Revenue

FBM/mre

2-3

Intervenors' Exhibit 2.
S. District Court December 13, 1944.

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Contract Blank

MUSIC CORPORATION OF AMERICA

[redacted]

THIS CONTRACT for the personal services of musicians, made this 21st day of July 1943

between the undersigned employer (hereinafter called the employer) and Sixteen (including Leader) musicians (hereinafter called employees) represented by the undersigned representative

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Jan Garber according to the following terms and conditions

Place of employment Rainbow Randevu, Salt Lake City, Utah

Date(s) of employment August 6, 7, 9, 10, 11, 1943

Hours of employment 9:00 P.M. to 1:00 A.M.

Price agreed upon $ 2,500.00 plus 50% gross receipts over $5,000.00
(Terms and amount)

To be paid _____
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Intervenors' Exhibit 2.
Filed in U. S. District Court December 13, 1944.

Name of Employer Jerry Jones

Street Address Rainbow Randevu

City or State Salt Lake City, Utah

Phone

FORM 1

Accepted by Employer (signed) Jerry Jones
Jan Garber

Accepted (signed) A. T. Michaud, Mgr.
(Orchestra Leader)

By (signed) Earl F. Bailey
(Representative of Employer)

MUSIC CORPORATION OF AMERICA

523

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Jan Garber (Leader)	10	522-26-9410	
Buford Leroy Crouch	47	507-07-3728	
Joe Degulli	208	428-20-6216	
Hugo D'Ippolito	802	091-07-3403	
Charles Ford	10	569-10-4296	
Jack H. Dougherty	99	445-12-7636	
Arlyn Lupies	8	395-02-7721	
Loren Holding	47	564-12-9756	
William Arthur Kleeb	99	544-03-6325	
Carl Ladra	802	283-10-8828	
Robert N. Milliken	60	172-14-0651	
Dean Sayre	60	163-14-0795	
Jack Swift	Vocalist	412-07-8134	
Maurice Joseph Winter	368	455-24-5349	
George Annis	60	206-03-5916	
Wallace Leonard Sandberg	Vocalist	322-10-8629	
Francis Annis	60	207-16-6759	
Leona Martin Lewis	Vocalist	551-28-0736	

Filed in U. S. District Court December 13, 1944.
Intervenors' Exhibit 2.

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R-5

Rainbow Rendevu Ballroom

RETURN TO MAIL & FILES -- A&C-EMT

A&C:RR:3-SAH

OCT 18 1944

Collector of Internal Revenue,
Post Office Box 1288,
Salt Lake City 10, Utah.

Attention: EmT:YBM.

Reference is made to your letter dated October 9, 1944, and enclosures, relative to the Federal employment tax status of Mr. Les Brown and Mr. Jan Garber and the members of their orchestras with respect to services performed for Mr. Jerry Jones, doing business as the Rainbow Rendevu Ballroom, Salt Lake City, Utah, pursuant to the terms of "Form B" contracts dated December 27, 1943, and July 21, 1943, respectively, copies of which were furnished.

Mr. Jones contends that the leaders and members of their orchestras mentioned above were not his employees irrespective of the form of contract under which they were engaged and refers to the ruling made in office letter dated November 20, 1942. Such ruling holds that Mr. Sonny Dunham and the members of his orchestra were not employees of Mr. Jones with respect to services performed by them pursuant to the terms of a contract dated August 14, 1940, on a contract form of the William Morris Agency, Inc.

The status of leaders and the members of their orchestras depends to a large extent on the terms of the contracts under which their services were performed. The contract under which Mr. Dunham and the members of his orchestra performed their services is similar in terms to that which was considered in Williams v. United States, 129 Fed. (2d) 129 C.C.A. 7, 1942. The Bureau has decided to follow the decision reached in that case in determining the status of orchestra members who perform services under contracts and circumstances and conditions which do not differ in any material respect from the cited case.

The terms of the contract commonly referred to as Form B, the form of contract adopted by the American Federation of Musicians for use in connection with engagement of musicians on and after June 1, 1941, provide for the employment of a certain number of musicians, including the leader, designated as employees, to render personal services for the purchaser, the employer; that the employer shall, at all times, have complete control over the services which the employees will render under the specifications of the contract; and that on behalf of the employer the leader will distribute the amounts received from the employer to the employees, including the leader.

Filed in U. S. District Court December 13, 1944.
Intervenors' Exhibit 2.

A&C:RR:3-SAH

Collector of Internal Revenue,
Post Office Box 1288,
Salt Lake City 10, Utah.

The extended consideration which has been given to the terms of the "Form ?" contract, and the circumstances and conditions under which the leaders and members of their orchestras perform services thereunder, has led to the conclusion that the purchaser of the music has the right to exercise over the leader and the members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee between the parties. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, the ruling of the Bureau that leaders and members of the orchestras who perform services under this form of contract are employees of the purchasers for Federal employment tax purposes. Your attention is invited to paragraph two of A.C.I.T.-Mimeograph Coll. No. 5638.

SAH:JMC

[illegible]

Acting Deputy Commissioner.

Interveners' Exhibit 2.
Filed in U. S. District Court December 13, 1944.

[fol. 719] Mr. Padway: Here is another one, which is dated October 18, 1944; and it is offered in the same manner as to form. Intervenors Exhibit 3.

Mr. Charlton: The same objection.

The Court: We will take it subject to the objection. (Plaintiffs except).

[fol. 720] Interveners' Exhibit 3.

Filed in U. S. District Court December 13, 1944.

Treasury Department
Office of Commissioner of Internal Revenue
Washington 25, D. C.

A&C: IT-Mimeograph February 21, 1944.
Coll. No. 5638
R. A. No. 1339

Status of Musicians and Variety Entertainers for Purposes of Employment Taxes under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and for Purposes of the Income Tax Withholding under the Current Tax Payment Act of 1943.

Collectors Of Internal Revenue, Internal Revenue Agents In Charge, And Others Concerned:

1. Many persons who operate theatres, night clubs, restaurants, and similar establishments have asked to be advised whether or not they are the employers of certain musicians and variety entertainers for purposes of the employment taxes imposed by the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and for purposes of withholding under the Current Tax Payment Act of 1943. If such persons (hereinafter called operators) are the employers of the musicians and entertainers, the operators are subject to various requirements in collecting and paying the taxes, and in keeping records of employees and their wages.

2. It is the position of the Bureau that an operator for whom musicians perform services pursuant to a "Form B" contract is the employer of such musicians, including the leader, for purposes of employment taxes and the income tax withholding. The operator, as employer, is re-

quired to collect from the musicians both the employees' tax under the Federal Insurance Contributions Act and income tax under the Current Tax Payment Act of 1943 and to make returns and payments of such taxes to the collector of internal revenue. The operator also is required to pay employers' tax under the Federal Insurance Contributions Act with respect to wages paid by him for the musicians' services and to include such wages in his annual return under the Federal Unemployment Tax Act if he is an employer of eight or more (including the musicians), as defined in that Act. This rule also applies to any entertainer or actor who performs services for an operator under the provisions of a "Form B" contract or other contract having substantially similar provisions.

3. In general, the variety entertainers with respect to whom operators have made inquiries are those who acquire and perform their own repertories in a series of short-term engagements for a number of different operators under contracts which ordinarily specify only the time, remuneration, place, and duration of each engagement.

4. The Bureau is unable, at this time, to rule conclusively on the status of the variety entertainers referred to in Paragraph 3, above. Until a conclusive ruling is made operators of theatres, night clubs, restaurants, and similar [fol. 721] establishments may consider such entertainers to be independent contractors and will not be required to collect tax from such entertainers or report or pay taxes with respect to the remuneration of the entertainers, unless the Bureau determines in a specific case that taxes should be collected, reported, and paid. Each operator should keep records of entertainers' names, account numbers, and wages, however, for the purpose of enabling the operator to make such returns or reports as may be required of him if the operator is subsequently determined to have been the employer of the entertainers.

5. The tentative ruling stated in Paragraph 4, above, will prevail only until such time as a conclusive ruling is published by this office.

6. Inquiries relating to the income tax withholding should be addressed to this office for the attention of IT:P:T. Inquiries relating to employment taxes should be

addressed to this office for the attention of A&C:RR. Correspondence otherwise relating to the contents of this mimeograph should refer to the number thereof and the symbols A&C:RR.

HAROLD N. GRAVES,
Acting Commissioner.

[fol. 722] Mr. Padway: The intervenor presents another ruling of the Treasury Department, and it is dated February 21, 1944, to the Collector of Internal Revenue. I did not have time to get it certified, but it is on a mimeograph of the Government, and I show it to counsel, and I wonder if you will agree that this is a true copy of the February 21st ruling.

Mr. Charlton: The plaintiffs raise no question as to the document being a correct copy of the ruling, but reserve the objection that the same is immaterial and irrelevant, and dated many months subsequent to the events involved in this case, and after this suit was started, and not bearing on any issue in the case.

Mr. Padway: I should say while it is dated some time afterward, as counsel has correctly said, it does bear upon the same subject as Form B bears upon the tax issue, and who is liable for it under Form B, and covers for the withholding tax, and brings the whole tax situation down to that date, and states who is liable for the tax, and it is directly relevant because it goes directly to the contractual status and relationship between the Form B contract, or behind the Form B contract since its adoption.

I have a later ruling, even later ruling than that, dated [fol. 723] November 21, 1944, by the Treasury Department covering the same subject of Form B, which reiterates all the previous rulings, and I should say affirms them.

Mr. Charlton: The same objection and the same concession.

The Court: All right. The same objection and I will take it subject to the objection. (Plaintiffs except.)

[fol. 724] Interveners' Exhibit 4.

Filed in U. S. District Court December 13, 1944.

Treasury Department
Office of Commissioner of Internal Revenue
Washington 25, D. C.

A&C:IT-Mimeograph
Coll. No. 5767
R. A. No. 1394

November 2, 1944.

Status of Variety Entertainers for Federal Employment Tax Purposes and for Purposes of the Income Tax Withholding Under the Current Tax Payment Act of 1943.

Collectors Of Internal Revenue, Internal Revenue Agents In Charge, And Others Concerned:

1. In A&C:IT-Mimeograph Coll. No. 5638, R. A. No. 1339, dated February 21, 1944, it was stated that the Bureau was unable at that time, to rule conclusively on the status of certain variety entertainers. In general such variety entertainers are those who acquire and perform their own repertoires in a series of short-term engagements for a number of different operators under contracts which ordinarily specify only the time, remuneration, place, and duration of each engagement. The Bureau further stated, however, that until a conclusive ruling is made, operators of theatres, night clubs, restaurants and similar establishments may consider such entertainers to be independent contractors.

2. Generally variety entertainers perform their special routines in a series of short-term engagements for a number of different operators of theatres, night clubs, restaurants, and similar establishments under contracts which ordinarily specify only the time, remuneration, place and duration of each engagement. The control, if any, which is exercised by such operators over the performance of their services is purely incidental to the continuity of the entertainment programs. Such entertainers will be considered to be independent contractors for Federal employment tax purposes and for purposes of the income tax withholding under the Current Tax Payment Act of 1943.

3. Paragraph 2 is not applicable in the case of those performers in a "stage show", "floor show", etc., who are clearly in the operator's employ, e. g., an orchestra, glee club, and chorus line.

4. This mimeograph does not change the position of the Bureau with respect to musicians, entertainers, or actors who perform services pursuant to a "Form B" contract or other contract having substantially similar provisions as stated in Paragraph 2 of A&C:IT-Mimeograph Coll. No. 5638, R. A. No. 1339. The rule stated in such paragraph of the mimeograph is equally applicable in the cases where leaders of orchestras pursuant to "Form B" contracts or other contracts having substantially similar terms undertake to furnish a "complete unit of entertainment" comprised of orchestra members and "acts" irrespective of whether remuneration is on the basis of a stated sum or on a percentage of the gross receipts. Variety entertainers performing services under such circumstances and conditions are excluded from the rule contained in Paragraph 2 hereof and are considered to be employees of the operator.

[fol. 725] 5. Inquiries relating to the income tax withholding should be addressed to this Bureau for the attention of IT:P:T. Inquiries relating to employment taxes should be addressed for the attention of A&C:RR. Correspondence otherwise relating to the contents of this mimeograph should refer to the number thereof and the symbold A&C:RR.

JOSEPH D. NUMAN, JR.,
Commissioner.

[fol. 726] Mr. Charlton: Is that booklet in which it is contained, is that it? I am asking this question in the hope we can arrive at a stipulation. Is the booklet in which the section and article which you referred to as contained, the official published Constitution, By-Laws and Standing Resolutions of the American Federation of Musicians of the United States and Canada as amended and adopted at the Forty-sixth Annual Convention held at Seattle, Washington, June 9-14, 1941?

Mr. Padway: Yes, sir, that is one of the many thousands that were printed.

Mr. Charlton: This is an official copy?

Mr. Padway: Yes. And I want to offer in connection with that copy Article 1, Section 1.

Mr. Charlton: No objection. In that connection, as everyone here knows, the Form B contract does incorporate by reference all the By-Laws, all the Constitutions, and whatever they may be, the regulations of the Musicians Union. I am wondering if we can stipulate and agree that the printed book which you have just handed to the reporter may be marked an exhibit 7 and received in evidence as a part of the Form B contract, according to the terms of the contract?

Mr. Padway: Yes, I think we can stipulate that. Of [fol. 727] course I want to make this reservation, that the book while purporting to be the official Constitution with respect to Article X, Section 29, the entire section that bears on that subject, the same is subject to the changes that this witness testified about that were made at Miami. These books are only printed, you know, at definite times, and they do not go right out and print a new one when the Miami meeting acted upon the various sections that conflict with Form B. With that understanding I have no objection to the whole book going in.

Mr. Charlton: That understanding is not unreasonable. Do you also agree, Mr. Cohen?

Mr. Cohen: No objection.

The Court: The whole book is admitted then, I take it?

Mr. Padway: Yes, with that understanding.

[fol. 728] Mr. Padway: Now, Your Honor, I have brought here and offer in evidence the Constitution and By-Laws of 1944 which is a subsequent book, and which shows the changes with respect to Article X, Section 29. I am offering that to show that the changes were duly made in subsequent printed Constitutions.

Mr. Charlton: Further proof as to the matter of the By-Laws, and Constitution and Standing Rules, or the au-

thentication of them is waived, and it is conceded that Exhibit 5 is the Constitution and By-Laws and Resolutions effective on and after the Chicago, Illinois, June 5th convention of 1944, but the exhibit and all its contents are objected to as incompetent, irrelevant, and immaterial, and having no bearing in this case.

Mr. Padway: I would be almost inclined to agree with counsel on the technical issue of relevancy except this, I offer it merely to show, it may be said, well, like your Constitution—may I say my purpose in showing this is when later Constitutions were printed with reference to when this Form B contemplated change and the action taken culminated in a composition which set forth the action in the later Constitution.

Mr. Charlton: There were some intervening publications of the By-Laws?

[fol. 729] Mr. Padway: There may be. I think the 1942 Constitution failed to make the change.

Mr. Charlton: I know it did. You are right about that.

Mr. Padway: That did not quite make much difference because Form B was being circulated and the action of the Board authorized it, but 1944 did incorporate the change. Now if you want to put 1942 in there, I have no objection.

Mr. Charlton: Do you have a copy?

Mr. Padway: I will get you a copy.

Q. You have seen the 1942 Constitution?

A. I am familiar with it.

Q. The 1942 Constitution did not make note of the change which now appears in 1944?

A. That is correct.

Q. Have you anything to say respecting that—why?

Mr. Charlton: Objected to as immaterial and irrelevant, and the witness not shown himself competent, and not the best evidence. We have asked to have that evidence here.

The Court: I don't see how that 1944 book would be competent in this case. We are talking about 1941 and 1942. I will sustain the objection to the 1944 copy of the Constitution. (Intervenor excepts).

[fol. 730] Mr. Padway: Then I am offering only the 1941 copy of the Constitution and the action taken on Section 29, Article X by the Executive Board.

Mr. Charlton: I join in the offer.

The Court: That is all right. It is in.

(See page 284) (Also page 283).

[fol. 731] Interveners' Exhibit 7.

Filed in U. S. District Court December 13, 1944.

Constitution.

By-Laws and Standing Resolutions
Of The American Federation Of Musicians
Of The United States and Canada

As Amended and Adopted at the Forty-sixth Annual Convention, Held at Seattle, Wash., June 9-14

1941

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By-Laws

Article I—Duties of Officers and Organizers.

Section 1. Duties of President. It shall be the duty of the President to preside at all meetings of the Federation and Executive Board; sign all documents of an official character pertaining to the Federation; sign all vouchers; appoint all committees unless otherwise ordered. It shall be his duty and prerogative to exercise supervision over the affairs of the Federation; to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members and/or Locals; any such order may by its terms (a) enforce the Constitution, By-Laws, Standing Resolutions, or other laws, resolutions or rules of the Federation, or (b) may annul and set aside same or any portion thereof, except such which treat with the finances of the organization and substitute therefor other and different provisions of his own making; the power so to do is hereby made absolute in the President when, in his opinion, such orders are necessary to conserve and safeguard the

interests of the Federation, the Locals and/or members; and the said power shall in like manner extend to and include cases where existing laws are inadequate or provide no method of dealing with a situation. He shall call special sessions of the Executive Board when necessary; call strikes; draw upon the funds of the Federation to pay the salaries of traveling members accompanying a theatrical organization when called on to strike while on the road, and for the payment, if necessary, of hotel and traveling expenses of other members who are called on strike by him during any emergency when outside of their own jurisdiction and play engagement for which no tax is collected by the Federation, and for which otherwise no strike benefits are paid; draw funds in payment of all expenses occasioned by the exercise of his duties; perform such other duties as may elsewhere be provided for in the Constitution, By-Laws and Standing Resolutions of the Federation; have the casting vote of a tie, and at the end of his term of office he shall report his acts and doings to the Annual Convention of the Federation, and upon convening of the Convention he shall appoint the following committees, viz.: First, Credentials; second, Finance; third, Laws and Supervision; fourth, Measures for the benefit of the Federation, and such other committees as may be voted for by the Convention.

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Sec. 3. Duties of the Secretary. The Secretary shall keep a faithful record of the proceedings of all meetings; answer all communications appertaining to the Federation; issue all charters upon receipt of a certified list of applicants for membership; inform all locals of all additions to the Federation, as well as all properly presented claims for default of services rendered by members; notify the delegates of all meetings; issue monthly statements of erased, suspended, expelled and transferred members in tabulated form; attest all bills and orders; cause the minutes of each convention to be printed in full and distributed to the Locals not later than thirty days after adjournment; publish not later than the July issue of the International Musician, all laws that have been amended, added to, or in any way changed; he shall send to each Local Secretary every six months a copy of the galley list of the Local for

inspection; he shall in his annual report, under the heading of "List of Locals," designate the jurisdictions of every Local as recognized by the A. F. of M.; he shall add to the list of Locals the name of each Local as it is known in its jurisdiction; procure and preserve the necessary books, papers and other documents appertaining to his office, and transmit them to his successor when properly qualified to receive the same, clear of all incumbrance. And for the faithful performance of his duties he shall receive a salary of fifteen thousand dollars ($15,000.00) per annum, payable semi-monthly; he shall be authorized to employ stenographers, typists and such other clerical assistance as may be necessary, at his own discretion; he shall notify all Presidents of Locals to incorporate an order of business through which members will be instructed to patronize none but union men and purchase only such goods as bear the union label.

Article IX—Rights and Duties of Locals.

Sec. 24. Locals have a right to insist that Local leaders or contractors engage local members to fill miscellaneous engagements outside of the local jurisdiction.

Sec. 27. A Local has the right to prevent a member from colonizing musicians in its jurisdiction. A leader, manager or agent (member of the Local) must obtain the consent of his Local before engaging musicians from outside for permanent or single engagements. But a member so imported shall not be required to deposit a transfer card unless the engagement extends over four weeks. Such member must not fulfill any other engagement until his transfer card has been deposited unless permission is granted by the Local.

Article X—Rights and Duties of Members.

Sec. 13. Leaders, contracting members or other members of a Local who demand, request, induce or try

to induce other members not to play with or for any leader or contracting member, or with or for any other member or members, shall be fined not less than $25.00 nor more than $100.00, or be suspended or expelled from membership by the Local with which they are affiliated.

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Sec. 20. Members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M. (See Article XVI, Contract Forms.)

Penalty: Fine of not less than $100.00.

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Sec. 23. A contracting member who assumes the responsibility for the payment of a member's services is bound by his action, and cannot escape his obligation by claiming the protection of any Local or A. F. of M. law.

Sec. 24. A Leaders of orchestras or bands playing season engagements on boats plying between different ports may engage members from any Local. Where Locals are maintained in such ports the highest price in existence among them governing such work shall prevail. However, if the International Executive Board deems the price maintained by any one Local contrary to the interests of any other Local equally interested, then the International Executive Board shall assume jurisdiction over the engagement and name a price equally binding upon all Locals and members.

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Sec. 29. Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished, provided that in states or provinces where laws exist, which prescribe a different method of contracting, or where the provisions of law are such that to contract as above prescribed would be contrary to the interests of members, Locals are authorized to establish such method

of contracting as may best conserve the interest to members. However, members may accept engagements from traveling theatre company managements direct, provided their contract, in addition to the signatures of the contracting parties, is countersigned by the musical director of the company or the member of the Federation who engages the members for the company. Furthermore, members may contract with symphony orchestra management direct in conformity with all Local and Federation laws.

If a member violates the above, such action shall constitute his resignation from membership in such Locals where he held membership, and in the American Federation of Musicians.

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Sec. 39. A member of the Federation cannot accept an engagement to join a traveling band or orchestra from a non-member, neither can he negotiate with a non-member for such an engagement.

A member shall be deemed guilty under the provisions of this law if he negotiates for such an engagement as named in the law with a non-member, even though he subsequently signs a contract for the same engagement with a member of the Federation.

A fine of $100.00 shall be imposed upon a member who violates this law, and if failing to obey the instructions of a Local or an officer of the Federation to forthwith surrender such engagement it shall be considered equivalent to his resignation from all Locals wherein he held membership, and in the American Federation of Musicians, and all Locals and members of the Federation must therefore consider him a non-member.

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Sec. 45. Any member, leader or contractor employing members of the A. F. of M. on any traveling, location or out-of-town engagement shall employ only such members who are in good standing in their respective Locals and carry their Local Union Cards paid up to date. For any violations of this section he shall be subject to a fine of not less than $10.00, nor more than $50.00 for each and every violation.

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Sec. 48. Members of the American Federation of Musicians who accept engagements for bands or orchestras must in person sign their contracts for same or give some agent power of attorney to sign their names. They are responsible for the fulfilling of the contract under union conditions, and ignorance of the terms of any contract signed by an agent shall not be valid excuse. The contract must be submitted to the Local Union for inspection in accordance with the rules of the Federation. All collections for the engagement must be made by the member who furnishes the orchestra and not by the agent. Members of the orchestra must be paid by the contracting member or leader of the band or orchestra and not by the agent. All agents who go into collusion with members to defeat the object of this or any other law of the American Federation of Musicians shall be held as unfair to it by the Federation and thereafter members cannot accept engagements from or through them.

The price of an engagement must cover the services rendered by musicians, and nothing else. If an orchestra carries added attractions, such as singers, etc., the contract must show an additional charge to cover their services. Leaders, their agents or contracting members, are prohibited from furnishing singers free of charge on any and all engagements.

If members fail to contract for engagements as herein prescribed or in any way violate the provisions of this law, such action shall constitute their resignation from membership in such Locals wherein they held membership, and in the American Federation of Musicians, and they shall be held as unfair to the Federation.

Article XII—Transfer Members.

Sec. 18

Traveling members other than leaders must sign contracts with contractors, members of the A. F. of M.

Article XIII.

Traveling Orchestras and Members.
Traveling Cards and Tax.
Members Playing Out-of-Town Engagements.

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Sec. 10. * * * * *

C. A contractor or leader, as the case may be, in every case before an engagement is played, must submit his contract for same to the Local Union in whose jurisdiction same is played, or in the absence of a written contract file a written statement with such Local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hours of the engagement, as well as the names of the members who will play same and the Locals to which they belong and the minimum amount of money paid each individual sideman, based on the minimum Local scale.

In addition to furnishing the foregoing information, a contractor or leader, as the case may be, must, before the engagement is played, inform the Local in whose jurisdiction the engagement is played the amount collected as to transportation charges and a point from which the transportation charges are made, and the exact and correct amount of percentage which will be paid to an agent or agents as compensation for booking the engagement.

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I. In the selecting of the members of the orchestra, the leader or manager of same need not confine himself to the membership of the Local in whose jurisdiction the orchestra is organized.

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K. All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two week's notice to the other.

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L. * * * * *

A member cannot form a traveling dance orchestra in the jurisdiction of the Local to which he belongs, and make such jurisdiction the headquarters of the orchestra, and compete for and fill local engagements with same.

M. . . . . .

Note—In all else the Constitution, By-Laws and Standing Resolutions of the A. F. of M. shall apply to the members of a traveling orchestra.

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Article XVI—Official Forms.

Official Contract Blank for All Engagements.

Contract Blank

American Federation of Musicians
Local Number.....

This Contract for the personal services of musicians, made this.....day of....., 194.., between the undersigned employer (hereinafter called the employer) and.....Musicians
(including Leader)
(hereinafter called employees) represented by the undersigned representative.

Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of....., according to the following terms and conditions:

Place of Employment.....
Date(s) of Employment.....
Hours of Employment.....
.....
.....
.....
Price Agreed Upon $.....
(Terms and Amount)
To be paid.....
(Specify When Payments Are To Be Made)
.....

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said

employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assume liability for the amount stated herein.

Name of Employer.....Accepted by Employer.....
Street Address.....Accepted.....
City or State..... (Orchestra Leader)
Phone.....By.....
(Representatives of Employees)

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Article XVIII—Miscellaneous.

Section 1. Performers on musical instruments of any kind who render musical services for pay are classed as professional musicians and are eligible for membership, subject to the laws of and jurisdiction of the A. F. of M.

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[fol. 732] Q. As a member of the Board have you attended all the conventions of the Federal Musicians?

A. The last five years.

Q. All the Board meetings the last five years?

A. Yes.

Q. Referring to the action taken at Miami in 1941, has that ever been reversed?

A. It has not.

Q. It is still the ruling as promulgated at that time?

A. It is.

Q. Is Form B still being used?

A. It is.

Q. Are your members compelled to use Form B now?

A. Yes.

Q. Were they obliged to use Form B in 1942?

A. They were.

Q. How about 1943? A. The same.

Q. How about 1944? A. The same.

Q. There never has been any change in the action taken on that matter? A. No.

Q. Would it in any way affect the standing or reputation of a band leader or musician, if you know, for instance if he asked—when I say asked—Geer and Bartels asked the lead-

er to change any man at certain times or play certain dance music, or designate the class of music he wanted, in your [fol. 733] opinion?

Mr. Charlton: That is objected to as calling for an opinion and conclusion of the witness, immaterial and irrelevant.

The Court: Sustained. (Intervener excepts.)

Mr. Padway: I just wish to say that is almost verbatim the question asked by counsel, Mr. Roberts of Geer, and Mr. Geer went into a dissertation on that first one, and he said for the purpose of maintaining the reputation the leaders exercised that particular function in the selection of music, and took their own intermissions, and did that for that purpose, for the purpose of building up reputation. I am just merely meeting it.

The Court: Let us comply with the rules of this matter. I have tried a good many lawsuits and I know where I am on this matter. I don't care for any more arguments on that. (Intervener excepts.)

Q. Would it at all affect the character of the music to be played at Mr. Bartels' or Mr. Geer's establishments, so far as the patrons were concerned, if Mr. Geer or Mr. Bartels issued orders as to the selection of music to be played?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness, and no proper foundation laid, [fol. 734] immaterial and irrelevant.

The Court: Sustained. (Intervenor excepts.)

Q. You played in bands, traveling bands?

A. Yes, sir.

Q. Have you exercised the function of a leader of those bands? A. No.

Q. I mean in the sense of leading a band; have you led a band?

A. Once in my life.

Q. Just once in your life. How many traveling bands have you been with?

A. I don't recall, having been with them some years ago, not more than four or five years.

Q. You mean by that over a period of four or five years you traveled with traveling bands?

A. That is true.

Q. With your experience, have you in mind the question I put to you? A. Yes.

Q. Can you answer it?

Mr. Charlton: Same objection.

The Court: Sustained. (Intervenor excepts.)

Mr. Padway: Your Honor, it was on the basis of com- [fol. 735] petency that the court made the ruling?

The Court: Partly. He was not out here to state he knew anything about these bands. He would have to be out here among these bands. He would not be competent about that. I don't want to know about since that time.

Mr. Padway: Would not the court take judicial notice that these traveling bands of this size of Bartels play almost the same thing over the country?

The Court: I could not hardly go that far. I can go far enough in this neighborhood to take quite a little notice of it. I would not say that I would take judicial notice that they are all the same.

Mr. Padway: I will see if we can further qualify him.

Q. Where have you worked for five years that you did work, what five years were they?

A. Oh, 1919 to 1924.

Q. As president of a Union, do your members go out traveling?

A. Our members do go out traveling.

Q. And you come in contact with them?

A. Yes.

Q. Discuss their problems?

[fol. 736] A. Yes.

Q. Their grievances? A. Yes.

Q. And know how bands are constituted?

A. Yes.

Q. You know how bands operate and the circumstances under which they operate over the country?

A. Yes.

Q. What particular territory did you travel?

A. Alabama, Arkansas, Tennessee, Texas, perhaps Georgia, and even down to Florida.

Q. Do the traveling bands that are composed, let's say of anywhere from nine to fifteen or twenty members, the leader, and among the sidemen appear different and operate different in different territories?

A. I don't think so.

Q. Have you been to dance halls in different territories?

A. Quite a few.

Q. Were you over at Babe's last night here in Des Moines? A. I was with you.

Q. I didn't want you to say that. Did they play any different there than they would at any night club of that type in Cincinnati, New York, or any place else?

Mr. Charlton: Objected to as calling for an opinion and [fol. 737] conclusion of the witness, the witness not shown qualified, in spite of his company and visit to Babe's?

Mr. Padway: I am going to renew the question without repeating it.

The Court: You better repeat it. We have forgotten what it was.

Q. Would you say that on orchestra would suffer any detriment in reputation if the establishment contracting for that music was to tell the leader when to take intermission, or when to play a particular kind of music, waltz at one time, a rhumba, at another time different music the patrons wanted?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness in a field of public relations promotion, and a witness not shown qualified, the proper foundation not having been laid, irrelevant and immaterial.

The Court: Sustained. (Intervener excepts.)

Mr. Padway: At this time would it be on the relevancy and materiality?

The Court: Yes. What has that got to do with the matter at issue? It is away out on the limb.

Mr. Padway: It was put in by the other side.

Mr. Charlton: Oh, no.

[fol. 738] The Court: Not in that way.

Mr. Padway: That's all.

Mr. Charlton: Your Honor, I am not going to be able to finish the cross-examination tonight.

The Court: You may adjourn until 9:30 tomorrow morning.

5:00 o'clock p. m. court adjourned until 9:30 a. m., December 13, 1944.

Morning Session, December 13, 1944.

9:30 o'clock.

The Court: We would be up to the cross-examination, but do you have anything else you want to ask your witness?

Mr. Padway: A few things, Your Honor.

Oscar F. Hild, being recalled as a witness on behalf of the Intervenor, testified as follows:

Direct Examination.

By Mr. Joseph A. Padway:

Q. Mr. Hild, were you present at the Seattle Convention of The American Federation of Musicians in 1941?

[fol. 739] A. Yes, sir.

Q. Were you present when the convention took action with respect to the matters that had been acted upon by the Executive Board in the previous meeting?

A. Yes, sir.

Q. What was the action of the convention respecting approval or disapproval of the adoption of the Form B contract by the Board in Miami the previous February?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness, the witness not having shown himself qualified or competent, and not the best evidence, irrelevant and immaterial.

The Court: Overruled. Answer, please. (Complainants except.)

A. It was affirmative.

Q. The convention confirmed it?

A. Yes, sir.

Q. Now following that affirmation was Form B adopted in the convention in 1941? I just want him to answer that yes or no.

The Court: Well, I didn't think of that. You don't mean by the convention? Of course that would naturally follow. You were talking about the convention in Seattle. You don't mean by the convention?

[fol. 740] Mr. Padway: I am talking about the physical incorporation of that action in the Constitution. My question was this: Was the adoption of Form B contract physically incorporated by being printed in the 1941 Constitution?

Mr. Charlton: The same objection. Not the best evidence.

The Court: That would not be the best evidence.

Mr. Padway: This is '41.

The Court: That is already in evidence.

Mr. Padway: No. I am not making myself clear.

The Court: I don't want to keep you out of the evidence.

Q. I will put it this way. On page 176 of the 1941 Constitution there appears this: "Article XVI—Official Form. Official contract blank for all engagements. Contract Blank. American Federation of Musicians. Local Number....." And a full and complete copy of an agreement or form.

Mr. Charlton: What was that article?

Mr. Padway: Article XVI, page 170.

Q. Now you see that it appears there. What is that?

A. It is the form of contract which was adopted at Miami at the previous meeting in January of the previous year.

[fol. 741] Q. And the one that was approved in the convention? A. That is correct.

Q. And is that identical with all of the Form B exhibited here in court? A. Yes, it is.

Q. Now then, Mr. Hild, was that the first time—I will withdraw that. Are you familiar with the provisions of

the printed Constitution of the American Federation of Music? A. I am.

Q. Are they printed annually? A. Usually.

Q. Well, there was a skip in 1943? A. Yes.

Q. There was one printed in 1940? A. Yes.

Q. One in '39? A. Yes.

Q. And going back for about forty years?

A. That is correct.

Q. Are you familiar with those Constitutions in so far as the presence of Form B is concerned? A. I am.

Q. Did Form B ever appear with a regular number or [fol. 742] anything like it in any previous Constitutions?

A. It did not.

Q. Did Article X, Section 29 appear in previous Constitutions? A. It did.

Q. It appeared in 1940? A. It did.

Q. 1939? A. It did.

Q. How many years would you say approximately, to your knowledge, that Article X, Section 29 appeared in former Constitutions?

A. Fifteen or twenty years.

Q. At least fifteen years? A. At least fifteen.

Q. So then the Article XVI in the '41 Constitution was a subsequent Constitutional Article, or adopted subsequent to the Article known as Article X, Section 29?

A. That is correct.

Q. Did Article XVI, the Form B contract, appear in the 1942 Constitution? A. It did.

Q. I show you what purports to be a copy of the 1942 Constitution and direct your attention to page 174 and [fol. 743] direct your attention to the heading in black faced type, Article XVI—Official Forms. Official Contract Blank for All Engagements. And after you have looked at it I ask you whether it is the same form, containing the same rules as were adopted at the Miami meeting?

A. It is the same form.

Q. And it was then in force and effect in 1942?

A. It was.

Q. It was in force and effect in 1943? A. It was.

Q. Still in force and effect? A. Yes, sir.

Q. Appears in the 1944 Constitution? A. It does.

Q. So it has been continuously in force and effect since adoption at Seattle in the Convention? A. It has been.

Q. Mr. Hild, I think you said yesterday you were a musician for how many years? A. About thirty.

Q. You have been an official of the Union for how many years? A. About fourteen.

Q. And have been a member of the Executive Board [fol. 744] for— A. Four years.

Q. Is it encompassed within your duties to take up the business bookings of traveling bands?

A. Yes, I know something of it.

Q. Does the Executive Board—Strike that. In your activities as a member of the General Executive Board are you acquainted with a number of traveling bands in the country, the approximate number? A. Yes, I do.

Q. What are the approximate number of traveling bands in this country here?

Mr. Charlton: Objected to as immaterial and irrelevant.

The Court: You may answer. (Complainants except).

A. About 4,000.

Q. Are you familiar with the classification of them as to size? I take it some are larger than others?

A. They are larger, yes sir.

Q. In your experience have you gathered what is known in an official way as convention bands? A. Yes.

Q. Are they recorded with the American Federation of Musicians? A. They are.

[fol. 745] Q. Is it incumbent upon these bands to record a record of themselves with the American Federation of Musicians? A. Yes, sir.

Q. Most of them make some report with respect to the taxes as shown on the blank? A. Yes.

Q. And thus the Federation gathers the number of men employed? A. That is true.

Q. And these things are discussed at the meetings of the Executive Board?

A. Yes, a survey was made by—

Q. Made by Mr. Rex McCarty, wasn't it? A. Yes.

Q. What can you say as a result of your experience and as the result of your acquiring knowledge as an officer of the approximate percentage of bands that have seven or less and those that have eight or more, if you know?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness, the witness not shown himself qualified, not the best evidence, and no proper foundation laid, immaterial and irrelevant.

The Court: I have not got the point as to the difference in these organizations but counsel seems to put some point [fol. 746] on it, so we will be glad to take the testimony. You may answer, please. (Complainants except).

A. I think they are about evenly divided. Some 2,000 with eight or fewer numbers, and some 2,000 with eight or more members.

Q. Now, Mr. Hild, in a rather facetious vein yesterday I alluded to your being at Babe's the other night, and I was with you. Now I want really to make a point of that in evidence. Will you bear in mind you were there night before last at one restaurant where music is furnished with the meal known as Babe's. Were you there the night before? A. Yes.

Q. And it employs an orchestra? A. Yes.

Q. It furnished dances too? A. Yes.

Q. Give us the number of that orchestra.

Mr. Charlton: Objected to as incompetent, irrelevant and immaterial, and bearing upon an entirely different type of establishment, and having no bearing upon the issues in this case.

The Court: If it has no bearing the court won't consider it. Answer. (Complainants except).

[fol. 747] A. Three.

Q. A piano player, I think?

A. Saxophone and drummer.

Q. We made an observation, didn't we, as to about how many people could be seated in that room we were seated in? A. We did.

Q. What were the number of customers that could be served? A. About 300.

Q. Pretty well filled, wasn't it? A. Yes.

Q. Let us bring out, forgetting the class of music played, or whether dances, waltz, or rhumba, but in so far as the character of the establishment serving the food, serving beverages at the tables, and space for dancing.

and platform on which the musicians were sitting, what I am describing was all present, was it? A. It was.

Q. The intermissions and the like, is that any different than the establishment that was described by Mr. Geer, or that operated by Mr. Bartles, if he operated it?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness, and the witness not shown qualified, immaterial and irrelevant.

The Court: We will take it subject to the objection. [fol. 748] You may answer, please. (Complainants except).

A. I think it was different from the establishment operated by these gentlemen.

Q. Now explain the difference as you observed?

Mr. Charlton: The same objection.

The Court: The same record. You may answer. (Complainants except).

A. The difference is in this instance it is part of the operation of general entertainment, whereas as I understand it, these gentlemen operate ballrooms in which ballroom dancing is the main attraction, and not quite secondary.

Q. Is the selling of beverage or any other service as an adjunct to your understanding in respect to furnishing music, is there any difference? A. No.

Q. What states have you played in? Could you name them, as a musician, practical musician in bands?

A. In different orchestras I have played in about six states.

Q. Name them.

A. Alabama, Arkansas, Tennessee, Mississippi, Texas, and Georgia. That is about all.

Q. Now with respect to Cincinnati, that is where you live, isn't it?

[fol. 749] A. That is correct.

Q. You live in the city of Cincinnati?

A. That is true.

Q. You are an official of the Cincinnati Union?

A. That is true.

Q. Is it your business to contact orchestras on their location and contact the men and leaders? A. It is.

Q. Does it not provide in this contract Form B that Union business agents in the exercise of their duties shall have the right to contact the leader and men on duty?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, and not the best evidence, immaterial and irrelevant.

The Court: It is not the best evidence, but the same time you may answer. (Complainants except).

Mr. Charlton: That is the only reason that I am objecting to it, it is incompetent.

A. It does.

Q. In other words, it is part of the duty of the officials, in the capacity of your duties to go around and visit these men and visit these places? A. It is.

Q. You have heard Mr. Bartels describe his estab[fol. 750] lishment. Are there any such establishments in Cincinnati? A. There are.

Q. Are there in Ohio? A. There are.

Q. Were there in the states you traveled around in? A. There were.

Q. In the bands that you placed in the bands in these six states you have mentioned is the general operation of playing and rendering music any different than was described by Mr. Bartels and Mr. Geer in their establishments?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, incompetent, irrelevant and immaterial.

The Court: We will take it subject to the objection. You may answer. (Complainants except).

A. I don't think so.

Q. Now the Union insists that the leaders and orchestras performing musical service shall be on the basis set forth in Form B contract? A. That is true.

Q. Is that the rule of the Union with respect to every traveling band in the country?

Mr. Charlton: Objected to as not the best evidence and calling for the opinion and conclusion of the witness, im-[fol. 751] material and irrelevant.

The Court: I suppose that necessarily follows. You may answer. (Complainants except).

A. It is.

Q. What would happen to a band leader and the members of his band if they refused to obey orders given them respecting their employment by Mr. Geer or Mr. Bartles?

A. Well, the contract could be cancelled for failure to abide by its terms, and under our laws, the laws of the American Federation of Musicians, the employer has equal rights with the musician in appealling to the American Federation of Musicians for adjudication under the contract, so if by the act of the employe the musician, the contract were abrogated the employer could file with the American Federation of Musicians a claim for actual damages under that contract. We have had many such claims of employers.

Q. In other words, where orders were given to the band leader or sidemen which they had refused to do?

A. I would not say that specifically. I would say we have had claims arising from one reason or another. I don't think there have been any where the musicians have refused to obey orders.

Q. And under the Form B contract must he obey orders?

[fol. 752] Mr. Charlton: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion and opinion of the witness.

The Court: You have gone over that. (Intervener excepts).

Q. If a leader or sideman had refused to obey an order given him by the establishment or employer it is your statement that Mr. Bartels or Mr. Geer or the others situated like him could declare the contract terminated?

Mr. Charlton: Objected to as leading and suggestive and repetition.

The Court: We will take it subject to the objection. (Complainants except).

A. Yes.

Q. You heard Mr. Bartels and Mr. Geer state that they gave no orders? A. I did.

Q. Don't answer this question until Mr. Charlton has had a chance to see whether he wants it answered or not: If Mr. Geer as the operator of his establishment, Mr. Bartels, operator of his establishment, had given orders to the persons they employed respecting the character of the music to be rendered, waltzes or two-steps, or modern dances, rhumbas, and as to the number of them to be in-
[fol. 753] terspersed, as to intermissions, as to playing loud or playing soft, as to placement of the musicians, as to mixing with the guests or otherwise, would the members of the American Federation of Musicians and these men employed by Mr. Geer and Mr. Bartels, the leader and sidemen, be obliged to perform, to conform with and obey those orders?

Mr. Charlton: Objected to as not a proper hypothetical question, as calling for the opinion and conclusion of the witness, no proper foundation laid, as suggestive and leading, as immaterial and irrelevant, as pertinent to no issue, and no fact or record in this case.

The Court: It would seem to me argumentative clearly and calling for the opinion of the witness, but I will take it subject to the objection if you want to offer it.

Mr. Padway: Yes.

(Complainants except).

A. The members would have been required to obey all regulatory requests from the employer.

Q. By regulatory requests you mean those which I mentioned?

A. I mean those which you mentioned.

Q. In accordance with the Constitution of the American
[fol. 754] Federation of Musicians here in evidence, 1941, 1942, and you referred to 1944 and the Form B contract, would the band leader of a band employed by Mr. Bartels or Mr. Geer in the manner and at the times they were employed as mentioned by Mr. Geer and Mr. Bartels in court here, be obliged to discharge a sideman upon request of Mr. Bartels and Mr. Geer?

Mr. Charlton: The same objection as previously stated.

The Court: Those are the same questions I sustained the objection to on yesterday, clearly asking this witness' opinion upon the construction of a contract, but I will take the evidence if you insist on it.

Mr. Padway: I would like to take it, if the court please. I understand it is taken subject to objection, and the court can disregard it if it is not material.

(Plaintiffs except).

Q. What is your answer? A. It would be.

Q. You heard it stated yesterday that Mr. Geer on one engagement when the band arrived--Let me reframe that question. You heard it stated yesterday that Mr. Geer, on one occasion when Mr. Moorhead came with his band there was the absence of a piano player. You remember that testimony?

[tol. 755] A. Yes.

Q. You heard it stated that the piano player was employed by the name of—it escapes me—you heard it stated that she played with the band? A. Yes.

Q. But was not a regular member of the band?

A. Yes.

Q. Was it incumbent upon and the duty of Mr. Moorhead to employ her with his band upon the request of Mr. Geer?

Mr. Charlton: The same objection last previously urged, and the further objection that it is assuming facts not in the record.

The Court: It is purely his opinion about it and whether or not it is controlled by contract. You can take it, but it is his opinion. (Complainants except).

A. It was.

Q. Is that the duty of every leader when requested by an employer of an establishment to employ a musician that he names?

Mr. Charlton: The same objection, and may my objection without repetition stand to this line of questions?

The Court: You better put them in.

Mr. Padway: It is only this, if the court please, it is understood that this line of questioning is objected to by [fol. 756] Mr. Charlton to each and every question.

Mr. Charlton: And on the ground last stated in, the previously stated objected.

Mr. Padway: Even though I am putting that on the grounds, I am making the record to show it on the ground or question of control, that is what I am after.

The Court: Of course I understand you cannot control some other court unless you want to make an agreement with the reporter to put in the objections.

Mr. Padway: Let the reporter note an objection to each and all these questions as having been made by Mr Charlton.

A. Yes.

Q. It would be the duty with all leaders?

Mr. Charlton: The same objection.

The Court: Put in my ruling under that agreement that it is taken subject to the objection. (Complainants except).

Mr. Padway: That is right.

Q. Mr. Hild, I am offering to put this question and I know what is going to happen to me. Does the Federation have any purpose in pressing the subject of who is employe and who is employer, and its relationship to the tax, social security tax?

[fol. 757] A. Yes, it has.

Q. What is that purpose?

Mr. Charlton: Objected to as immaterial and irrelevant, calling for a conclusion and opinion of the witness and hearsay.

Mr. Padway: I won't disagree with you on that at all, but if you will let me put it in, I think that is argumentative.

The Court: That is worse than argumentative. (Interveners except).

Q. Going back to the line of questioning that has been objected to and taken subject to the objection, I would like to ask you a few things. I asked you about the seating arrangement, that was included in my question and your answer. Then I asked you about playing more loudly and softly; I don't know whether I included in that faster or slower, would the same answer be there, that they would have to take these orders from the establishment?

Mr. Charlton: The same objection.

The Court: We will take it subject to the objection. (Complainants except).

A. Yes.

Q. Did I ask you about mingling or not mingling with [fol. 758] the patrons, that was up entirely to the establishment?

Mr. Charlton: Same objection.

The Court: The same ruling. (Complainants except).

A. It is.

Q. And Mr. Charlton and Mr. Roberts, I asked the witness yesterday respecting the use of loud speakers, and that the band leaders brought loud speakers, and in one instance Mr. Geer, I think, had his own loud speaker, and both were used. What is the fact as to whether the control of the loud speaker and the use of it within the establishment, may it give an order respecting the use of it or lack of use of it?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except).

A. Yes, it may.

Q. It is entirely up to them whether it will be used or not?

Mr. Charlton: The same objection

The Court: The same ruling. (Complainants except).

A. Yes.

Q. From what you heard of them, I say the band leaders do carry loud speakers with them.

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except).

A. That is a holdover from the dance not so long ago [fol. 759] when loud speakers were not general equipment in rooms in which music played, so as a matter of convenience to everyone where the convenience has not been installed, they carry loud speakers. Today most of the establishments have a loud speaker system put in their quarters.

Q. They could very well get along without the loud speaker with the band?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except).

A. Yes, they could.

Q. If the employer, or Mr. Geer or Mr. Bartels decided to make out separate checks to the sidemen, and have the leader distribute them, would he be allowed to do that in that form?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, and the witness not shown qualified, and speculative, and no proper foundation laid, immaterial and irrelevant.

The Court: I will take it subject to the objection. (Complainants except).

A. He would be.

Q. In other words, within the contract figures, if a list were handed to the leader and the establishment said to write out the checks in the amounts and names, the leader [fol. 760] would have to distribute them in that manner?

Mr. Charlton: The same objection, and invading the province of the court.

The Court: The same ruling. (Complainants except.)

Q. You heard it said here about uniforms, that the men furnish their own uniforms; is that the custom in the United States that bands that travel with sidemen, that the band-leader and the sidemen bring their own uniforms?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Yes, it is.

Q. As a man who has played in a band, would it be possible, owing to the short duration or short engagements, to handle the subject of uniforms otherwise?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Scarcely possible.

Q. They could not?

Mr. Charlton: Same objection.

The Court: The same ruling. (Complainants except.)

[fol. 761] A. No.

Q. Respecting rehearsals, bands do have to rehearse from time to time where there are new members or in fact where there are old members, don't they?

A. Yes.

Q. Does the establishment have the right to control and direct the rehearsal and where they shall be had and fix the place?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Yes.

Q. And is it done by establishments?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. It is done frequently.

Q. Establishments, it was testified often had other attractions which are outside of the musical field, acts as we call them, vaudeville acts, and matters of that kind?

Mr. Charlton: Objected to as immaterial and irrelevant and not in the record.

Mr. Pidway: You brought it out.

Mr. Charlton: I did know of these acts.

Q. These bands operating in the manner that the bands did as brought out by Mr. Bartels and Mr. Geer, playing

[fol. 762] music with attractions purchased or contracted by the establishment, you know that to be a fact from your own knowledge as a musician?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Yes, sir.

Q. In such instances are the bands often required to rehearse with these attractions?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Especially with the attractions.

Q. Are the leaders and musicians of the American Federation obliged to accept orders respecting these rehearsals from the establishment?

Mr. Charlton: Objected to as having no bearing upon the issues in this case, calling for the opinion and conclusion of the witness, and leading and suggestive.

The Court: We will take it subject to the objection. (Complainants except.)

A. They are subject to the orders of the establishment.

Q. Now there is one or two other questions, and I think I am through. These questions that I have asked you, or at least I intended, were in connection with traveling bands; what is the fact as to whether there are other bands than [fol. 763] traveling bands, bands on location?

A. There are bands composed of members of the American Federation of Musicians who prefer to remain in one town because of families and personal connections rather than travel on the road. There is no difference in the manner of rendition of service as between a traveling band, so-called, and a local band, so-called.

Q. They too must operate under B Form contract?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Yes.

Q. What would you say with respect to the size of those generally, large bands or small?

A. In general the bands which remain in one locality are smaller bands than those which travel, as a general rule.

Q. What would you say as to whether they are in number, seven or less, would the larger proportion be seven or less?

A. The larger proportion would be seven or less.

Q. Have you any idea as to how many such bands there are in the country?

Mr. Charlton: Objected to as immaterial and irrelevant, and having no bearing on any issue of fact in this case.

[fol. 764] The Court: It certainly is not, but we will take it subject to the objection. (Complainants except.)

A. It would be difficult to even estimate the number of such bands because they are not subject to national regulation as are traveling bands in the same sense that we do not have the information available from various and sundry reports made to us.

Q. You do not have the number?

A. I don't know.

Q. Would it be fair to say that in the United States almost any community of any size of 10,000 or above might have one of those bands?

Mr. Charlton: The same objection.

The Court: We do not have to go into the "mights," do we? I can take it if you want it, subject to the objection. (Complainants except.)

A. I think that might be true.

Q. What would you say from your experience traveling around, have you found bands of that nature, you personally?

Mr. Charlton: The same objection.

The Court: The same record. (Complainants except.)

A. Yes.

[fol. 765] The Court: Do you have any que tions to ask, Mr. Cohen?

Mr. Cohen: I have a few questions I would like to ask him but I thought I would wait until Mr. Charlton was through.

Mr. Charlton: I prefer that you go ahead.

The Court: You are now adopting this man as your witness?

Mr. Cohen: No, this is cross-examination. He is not our witness.

Mr. Charlton: If the court please, I don't believe we are required to consent or assent to the parties appearing as having a community of interest, either of them to consider themselves as in a position of a cross-examiner.

The Court: You are right about that.

Mr. Cohen: As I understand the examination involved was made by the interveners.

The Court: And they joined in your position and raised exactly the same question and concurred in every thing that you had done. Now you cannot make them adverse to you. If that is the question of whether you have the right to cross-examine this witness I will be glad to rule on it. It does [fol. 766] not make much difference. I am not saying you haven't the right to examine, but I am saying you cannot use the rules of cross-examination in forming your questions. (Defendant excepts.)

Examination By Mr. Harold B. Cohen:

Q. Will you state what your position in the American Federation of Musicians was during 1941 and 1942 at the time of the engagement in question which I believe you mentioned on direct?

A. I was a member of the International Executive Board of the American Federation of Musicians.

Q. Now in connection with your position did you have occasion to sit as a member of the Board in disciplining members for infractions of the rules and regulations?

A. I did have.

Q. Was it within your province to interpret the By-Laws, Constitution, rules and regulations of the American Federation of Musicians in 1941 and 1942 for that purpose?

A. It was.

Q. So that you are familiar with the interpretation placed upon the Constitution, By-Laws, rules and regulations of the A.F.M. during those years, is that correct?

A. I am.

[fol. 767] Q. You are also familiar with the Form B contracts which are in evidence in this case?

A. I am.

Q. Now are you able to tell the court whether from your knowledge of the interpretations placed by the Union upon its Constitution, By-Laws, Rules and Regulations, that there is anything in the Constitution, By-Laws, Rules and Regulations which is at variance with or inconsistent with any of the terms of Form B contract?

Mr. Charlton: Does that call for a yes or no answer?

Mr. Cohen: Yes.

A. No.

Q. Are you able to state whether—Read the question.

(Question read by the reporter.)

Q. Are you able to state? A. Yes.

Q. Will you state whether there was any such inconsistency in 1941 and 1942?

Mr. Charlton: Objected to as invading the province of the court, as calling for a conclusion and opinion of the witness, not only his own but also a tremendous organization, as immaterial and irrelevant, no proper foundation laid in the testimony, the witness not shown qualified and not the best evidence.

[fol. 768] Mr. Cohen: I would be willing to go further into his qualifications, if necessary. I thought I would qualify the witness from his own official position as a member of the Board which passes upon these regulations as being able to state what the official interpretation of the Constitution, By-Laws and regulations were during this period. It is my understanding that so far as the Union or other association of that kind is concerned where it has certain laws or regulations, if the laws are not sufficient without interpretation placed upon them by that body, and in order to determine whether there is any variance with the regulations made in any senior parent body, to have an interpretation placed by the officials of the Union.

The Court: I will take it subject to the objection. (Plaintiffs except.)

A. No, there was nothing deemed contrary to these contracts.

Mr. Cohen: No further questions.

The Court: Now we are ready for the cross-examination by the plaintiffs. All right, Mr. Charlton.

Cross-Examination.

By Mr. Clyde B. Charlton:

Q. I believe you testified you were one of the high officers of this Union?

[fol. 769] A. I testified that I was a member of the International Executive Board of the Federation.

Q. You are not a lawyer? A. I am not.

Q. The meeting of the International Executive Board at Miami was held late in January, '41?

A. Beginning late in January, that is right.

Q. And continued until February?

A. That is correct.

Q. That meeting was a regular annual affair, was it not? A. Semi-annual.

Q. There, all the members present? A. Yes.

Q. Now the members of the International Executive Board are the president? A. Yes.

Q. Vice-president? A. Yes.

Q. Secretary? A. Yes.

Q. Financial secretary and treasurer? A. Yes.

Q. And the members of the Executive Committee?

A. Yes.

[fol. 770] Q. And it is a fact, as a member of the Executive Committee that you become ipso facto a member of the International Executive Board, is it not?

A. That is true.

Q. Did Mr. Padway attend those sessions? A. No.

Q. Mr. Cohen, of course, was not there? A. No.

Q. Neither was Mr. Wilson? A. No.

Q. Are those so-called semi-annual sessions play meetings, or do you really work?

A. We work about eight hours a day.

Q. You attended all those meetings? A. Yes.

Q. And Petrillo attended all those meetings? A. Yes.

Q. Petrillo was there at all of those meetings?

A. Yes.

Q. The secretary attended all the meetings?

A. Yes.

Q. You came here to Des Moines for the purpose of testifying for the Union in relation to what happened at those meetings, didn't you?

A. I did not. I came here as an observer because I am [fol. 771] inherently interested in this question. It was only after I was here that Mr. Padway asked me whether I would go on the witness stand and I agreed; but I am here at my own expense, I might add, as an individual, and primarily as an observer.

Mr. Charlton: I don't think it makes much difference, but I move to strike the last statement of the witness as voluntary and not responsive to any question asked.

The Court: I think it was. (Plaintiffs except).

Q. You claim to be fully informed as to what took place at those sessions? A. I do.

Q. Now the International Executive Board is the highest ranking authority except only the President of your Union, is it not? A. Yes.

Q. Now I think you testified that a full discussion was had on the matter of revision or preparation or devising of the Form B contract during the February and January, 1941 session? A. Of a form of contract.

Q. You were present during all of those discussions?

A. I was.

[fol. 772] Q. Those discussions were in the nature of an advisory discussion resulting from Petrillo laying the matter before the International Executive Board for discussion and advice? A. That is correct.

Q. Mr. Petrillo does ask your advice on some things?

A. He does.

Q. You do not claim the International Board took any formal action or gave any formal order or direction to Petrillo on this matter?

A. The International Executive Board adopted Form B contract, and instructed Petrillo to formulate the necessary verbage, formulate the necessary laws, formulate the necessary instructions to our people regarding its use and its adoption.

Q. You use the word "instruction." You stated, I think, on direct examination that your Board did not have the power to take any action with respect to the By-Laws or the laws, is that correct?

A. That is true, but the Executive Board has the right to instruct its officers.

Q. Upon their request? A. Upon whose request?

Q. Upon the officers' request?

[fol. 773] A. No, not upon request, contrary to common opinion.

Q. Now in the Musicians Union the By-Laws are commonly referred to as laws? A. That is right.

Q. I think you said that in the course of the discussions it was mentioned that it had been contended in court or somewhere that Section 29 of Article X of the By-Laws prohibited the Union members from being employes of establishments, or had been so contended?

A. Yes, there was a question put to me regarding such contention.

Q. Your sessions there at Miami was not called for the purpose of a general revision of your By-Laws, was it?

A. No.

Q. As I understand it, your Executive Board took some kind of action recommending something be done with respect to Section 29, Article X of the By-Laws?

A. Not specifically at that time. The Executive Board took action to adopt a contract, and took corresponding action instructing Petrillo to formulate the necessary changes, and adopt the necessary changes under his authority to bring about the action in adopting this contract to make it a certainty so far as its use and adoption by members is concerned.

[fol. 774] Q. Section 29, Article X, was the only By-Law mentioned in that connection?

A. Section 29, Article X, specified the general nature of conducting the business as between musicians and employers, yes.

Q. That is the one that you talked about and had in mind, is that correct? A. Yes.

Q. Now don't you keep any record as to what your International Executive Board does in its sessions?

A. I don't the secretary does.

Q. A record was made of each of those actions that you talked about here? A. It should have been.

Q. Your By-Laws require the secretary to make a record? A. Yes.

Q. The secretary is supposed to keep those records and not destroy them, isn't he? A. I think so.

Q. You know there is a complete written record of whatever the action was that you took in the way of recommending action or instructing that action be taken, don't you?

A. I don't think there is any transcript, if that is what you mean. I think there are notations made of what hap- [fol. 775] pened. The fact is I some times do receive those. I do not receive those notes and condensation of the minutes regularly. That was not the policy then, however.

Q. You know that the By-Laws of the Musicians Union require the secretary to make and cause to be signed either by himself or by the president, a record of every formal act that is taken, don't you?

A. I would think a good secretary would do that anyway.

Q. You know that the By-Laws require that?

A. I imagine that the By-Laws require that.

Q. There was, so you testified, an instruction or direction that went out from the Board to Petrillo, was there?

A. Didn't go out from the Board to Petrillo. The Board sitting in session over a number of days this matter was discussed and by motion Petrillo was instructed to accomplish these things that I have mentioned.

Q. Did you pass motions without making a record of them?

A. I never make the record myself.

Q. Does your Executive Board make and pass motions without having the secretary make the record of it?

A. No. I think the secretary sits there and makes constant notes. What he makes I am not familiar with.

Q. You did not have in mind testifying on this matter [fol. 776] when you came to Des Moines, did you?

A. No.

Q. Those sessions occurred nearly four years ago, did they? A. Yes.

Q. Do you think your secretary's written record would be as good as your memory on the matter of what that motion was?

A. I think his record and his memory would be as good as mine.

Q. It would be better, would it not?

A. It might be.

Q. Did you bring with you the secretary's minutes or record of that motion? A. I had no reason to.

Q. You did not expect to testify? A. I did not.

Q. You do not recall that anyone presented to you at any time during your sessions there the language of any revised By-Law, do you? A. No.

Q. That was your best recollection that the talk was about revision, wasn't it? A. It was.

Q. Of one or more By-Laws?

[fol. 777] A. It was.

Q. Do you recall when the session adjourned or was finished?

A. You mean the entire Board meeting?

Q. Yes.

A. I recall this much. It happens that my birthday is February 15th, and on February 15th I boarded a train to return to Cincinnati. I had my family with me and I may have stayed two or three days beyond the Board meeting. I don't know, that is all I know.

Q. At any rate, it was concluded on or prior to February 15, 1941? A. That is correct.

Q. Now, Mr. Hild, will you kindly carefully consider the next question because I want you to be sure to understand it: Do you or do you not claim that Petrillo prepared a written order which referred by its terms to a section of the By-Laws and revised or changed it?

A. I should say yes.

Q. The answer is yes?

A. The answer is yes.

Q. You have that written order? Strike that. You understand that question inquires concerning a written order which refers by its terms to one or more By-Laws which were purported to be revised or changed?

[fol. 778] A. Yes, I understand so.

Q. Do you have that order? A. I do not.

Q. Is it here in Des Moines?

A. Not that I know of.

Q. You understand that question used the word "written"? A. I understand.

Q. The secretary would have that, wouldn't he?

A. He might have.

Mr. Charlton: I am perfectly aware that a motion to strike is in order, but I desire to continue the examination on other lines.

Q. Now then in that connection and in those sessions there was a lot of discussion of a new form contract, wasn't there? A. There was.

Q. Those discussions indicated, or it was stated in those discussions, that the form of contract which was being discussed was one that would be generally used by musicians everywhere? A. Yes.

Q. Radio industry? A. Yes.

Q. Movie industry?

[fol. 779] A. Yes.

Q. Entertainment world?

A. Yes. We contemplated everything except symphony orchestra.

Q. Now then did Petrillo, or anyone, in those meetings assert that action with reference to a By-Law was urgent because it had just been discovered that twenty-five or thirty years ago most of the states enacted Workmen's Compensation Acts? A. Yes, that was discussed.

Q. Was it recognized that Workmen's Compensation laws had been on the statute books of the states for twenty-five or thirty years generally?

A. Yes, I think that was discussed.

Q. Was that a recent discovery of your Board that those laws were in effect? A. I think so.

Q. You had not learned about that previously?

A. They had not been cognizant of that, at least.

Q. The recent discovery that those laws had gone into effect was stated as part of the reason for the urgency of taking action?

A. I would not say the recent discovery that they had gone into effect, but the recent discovery of the failure of [fol. 780] many of our people to obtain benefits thereunder was under discussion.

Q. No one claimed or stated that there had been any recent change in any of those laws? A. No.

Q. Now did Petrillo, or anyone, assert in those discussions that action with reference to a By Law was urgent because it had been discovered that one hundred or so years ago the common law had developed the principle of respondeat superior?

A. Will you please put it in different language?

Q. Respondeat superior is the responsibility of the masters for the servants?

A. Yes, I believe even such subject was discussed. We have a few lawyers on the Board and they some times become very technical in their language also.

Q. Was it suggested as one of the reasons for agency?

A. No.

Q. You talked a lot about social security and unemployment advantages during those discussions, didn't you?

A. Yes.

Q. You heard and were told that Petrillo had made three separate trips to the Treasury Department for the purpose of discussing the proposed form of contract with [fol. 781] that department with reference to social security tax? A. No, I did not.

Q. You never heard that in those discussions?

A. No.

Q. In Petrillo's letter to the membership published in the Musicians Union—International Musician publication said that he made such trips, would you think it was true?

A. Prior to the Board meeting?

Q. Yes.

A. If he published it and said so I would say it was true.

Q. Well, if he did it and published it afterward, you would say it was true? A. I would say it was true.

Q. Don't you recall that an issue of the International Musician was devoted in several of its pages to an explanation of the excellent job which had been done in preparing to change the rule as to social security tax burden?

A. I don't recall any such statement with reference to the excellent job that was done. I remember many, many articles on the matter of explanation to our people as to what they should do and what they must do.

Q. The International Musician is the official publica-
[fol. 782] tion of your Union, is it not?

A. Yes, sir.

Q. So made by your By-Laws and Constitution?

A. Yes.

Q. Its publication is supervised by the secretary, is it not? A. That is correct.

Q. The secretary edits it, doesn't he?

A. That is right.

Q. That is the same secretary that sits on your International Executive Board meetings?

A. Yes, it [it].

Recess: 10:45 — 11:00 a. m.

The witness Hild resumed the stand for further cross-examination by Mr. Clyde B. Charlton:

Mr. Charlton: Your Honor and counsel, I am going to refer to some three pages of this May 1941 issue of the International Musician. I suppose perhaps the best is to mark those three pages.

Mr. Padway: Why not mark it and refer to the pages?

Mr. Charlton: You waive all objections?

Mr. Padway: Yes. We make no objection to that.

[fol. 783] Q. Mr. Hild, I hand you Exhibit B-37. You find that to be the May 1941 issue of the International Musician, do you not? A. I do.

Q. You find a big type headline across the top of that first page of the issue? A. I do.

Q. Will you kindly read it?

A. "Internal Revenue Department Decides For The Federation. Standard Federation Contract Which Construes Leaders As Employes Receives Department Approval."

Q. Do you find most of the first page of that issue is devoted to the printing of a letter which is concluded on page 18 of that issue purporting to have been issued and signed by Petrillo? A. Yes, sir.

Q. Referring now to the first page of that issue, and that letter, do you find that in that letter Mr. Petrillo advised that in 1940, in the month of November, I believe, he had a conference with the Treasury Department with reference to a form of contract which would be accepted by the Department as sufficient evidence of the establishment of musicians? A. No, I don't find that.

[fol. 784] Mr. Padway: Objected to as not the best evidence.

Q. I will have you read the recital in the rest of that letter for the record in reference to a 1940 conference?

A. "On November 19, 1940, Attorney Ansell, Thomas Gamble (my first assistant), and myself had a meeting with the Treasury Department attorneys in Washington, D. C. At this conference we discussed the question as to who was to be recognized as employer in a restaurant, cafe, hotel, etc., the contractor on the job, the leader, or the man who owns the establishment." Is that sufficient?

Q. Do you find a further recital "We had a very fine conference during which this matter was discussed from every angle," do you not? A. Yes.

Q. Further on in the article do you find a reference to a special discussion of the Executive Board meeting concerning the contract? A. Yes.

Q. And for the record what does Mr. Petrillo's letter say about that?

A. "The Committee then met on January 23, 1941, in Miami, Florida. (Four days prior to the meeting of the Executive Board for its mid-winter conference on January 27th)." By the Committee he refers to a different meet-[fol. 785] ing than a Special Committee. I am not sure. I have not read the article. "And discussed the contract pro and con, making such further changes as seemed advisable until finally it was in such shape that we could present it to the entire Executive Board, further discussions of the contract taking place when the Board meets at a whole. The contract was finally adopted unanimously."

Q. Now then just following the matter which you have finished reading, do you find a reference to a trip to Washington to confer with the Treasury Department?

A. Yes.

Q. What does Petrillo's letter say about that, for the record?

A. "Thereupon I made an appointment with the Treasury Department in Washington. I left the Executive Board meeting and went to Washington together with General Ansell and on January 31st we presented the contract which we felt convinced would be thought satisfactory to everyone concerned."

Q. In the second following paragraph do you find a reference to an additional conference between Mr. Petrillo and the Treasury Department at Washington?

A. The second following paragraph?

[fol. 786] Q. Yes.

A. No. Oh, I see. Yes.

Q. That was a Monday morning meeting, I think, according to this letter, was it not? A. I think so.

Q. What does he state concerning that Monday morning meeting?

A. "At the close of this conference I asked the Treasury Department whether it would not be best for them to meef with our attorney on the following Monday in order that there might be no misunderstanding concerning the changes made and they agreed to do so. I advised Mr. Ansell that when he was through with the Treasury Department to again return to Miami where the Board was still in session, because it was the wish of the entire Board that this contract be definitely disposed of before the Florida session adjourned. This the attorney did, at which time the contract was again discussed. One or two further minor changes were made. The Executive Board then passed a motion that the contract be referred to our Technical Adviser, Mr. Weber, and Attorney Ansell to discuss still further, while the Board and myself remained in executive session. Following the discussion between Messrs. Weber and Ansell the contract was brought back to the Board. The Board after due consideration, approved the contract [fol. 787] form and referred it back to the sub-committee for such further action as might become necessary in the interests of the Federation."

Q. Now, Mr. Hild, you do not find any reference in Mr. Petrillo's letter to any By-Law changes, do you? A. No.

Q. Does the reading of that letter refresh your recollection to the extent that you can now say that you recall that three different conferences by Petrillo with the Treasury Department were reported to your Executive Board?

A. I think I recalled that before, but I believe your question involved conferences prior to the discussion by the Board. May I go on and elaborate on the answer?

Q. I don't think the question calls for any elaboration. I don't want to shut you off, but I don't think it calls for it.

Mr. Padway: Go on and explain.

A. As evidenced by this article itself which was not read here. There were prior meetings. There was a prior meeting in October in Chicago in which the matter of uniform adopting of contracts first came up for discussion.

That is what I had lost track of, and was of the impression the first discussion occurred in Miami. The first discussion [fol. 788] occurred at the Board Meeting in Chicago.

Q. In other words, you confused the two Board meetings? A. Yes.

Q. At that Miami meeting you were told discussion had been had with the Treasury Department relative to Form B contract?

A. Not relative to Form B contract, relative to clarifying the status of musicians under the social legislation.

Q. Now then did anyone in those meetings raise any question as to whether the Treasury Department under its rules then in force was required to consider the true facts of the relationship as established by all of the facts surrounding the relationship before a determination could be made as to who the employer is in any situation?

A. Yes.

Q. That was mentioned, was it? A. Yes.

Q. Mr. Petrillo does not mention it in his article, does he? A. Apparently not.

Q. On page 18, which is the page to which the front page article is continued, the front page letter of the issue [fol. 789] of the International Musician you find an order of Petrillo, do you not?

A. I don't find it. Can you direct my attention to it? There are a number of columns here.

Q. That line (indicating). A. Yes.

Q. Will you read that order at the end of Mr. Petrillo's letter?

A. "Members are therefore advised that on and after June 1, 1941, all members of the Federation must sign contracts for all engagements, traveling or local, on this contract form and none other.

"The licensed booking agencies will also be required to use this contract form. Members must refuse to play any engagement if the engagement is contracted on any other form after May 31, 1941.

"Kindly be governed accordingly.

"Fraternally yours, James C. Petrillo, President."

Q. That order does not refer to a By-Law of the Union, does it, by its terms? A. No.

Q. Just ahead of the part which you read at the close of Mr. Petrillo's letter in this issue, there appears a full copy of Form B contract; is that correct?

[fol. 790] A. Yes.

Q. What is known in this record as Form B contract?

A. Yes.

Q. In this same letter Mr. Petrillo sets forth a letter, and copy of a letter addressed by him to the Commissioner of Internal Revenue asking for a ruling on that contract, does he not? A. Yes, it does appear that.

Q. You recall that from information in that discussion there at Miami?

A. No, I recall it from the circumstances which followed.

Q. You mean you discussed this matter and did not talk about the planning of that letter?

Mr. Padway: Look at the date. It would be impossible.

A. No, that letter was not planned there.

Q. You know that letter was sent to the Commissioner of Internal Revenue, do you not?

A. I know it only because of the final decisions in which he declined to make a reply to Petrillo direct.

Q. Then you know it, don't you? A. Yes.

Q. Did that letter make any reference to any other fact or circumstance other than the contract?

A. No, the letter presupposes that the letter is sub- [fol. 791] mitted as his own document.

Q. Mr. Petrillo published a letter to the membership also setting forth a ruling obtained by the leader of the orchestra referred to in his letter to the Department, does he not? A. Yes.

Q. And it refers to the ruling being made upon Mr. Petrillo's request? A. It does.

Q. Is that ruling letter referring to any fact or circumstance other than the Form B contract as pertaining to engagements and the determination of the fact there determined?

A. No, it refers to the contract only.

Q. I ask you now to examine page 24 of the May, 1941 issue of the Official Journal of the Musicians Union; do you find there printed what purports to be a copy of an order of the Executive Board of the Union?

A. Yes.

Q. Is that the order that you mentioned in your examination as issued by the Executive Board in connection with this whole matter?

A. There was no order of the Executive Board in connection with the whole matter. I said, I think, that the [fol. 792] Executive Board, which is always attended by the President is one thing, and the President who is not always surrounded with the Executive Board is another thing, and therefore, under our laws, the right to change and alter and amend laws rests with the President with the understanding, however, that whether the Board first or not, such changes are always submitted to the Board in their meeting.

Q. All right. Will you tell me whether that is the order that I referred to in your testimony earlier today is an order made by the Executive Board?

A. I am sorry. I don't believe I said that an order was made by the Executive Board. I said Mr. Petrillo was instructed to accomplish that which was necessary and this was his version of what was necessary.

Q. And that was done?

A. Yes, that is true.

Q. Did you find at the beginning of this publication of the order the words "By order of the International Executive Board the following notice was sent to all Locals of the American Federation of Musicians on May 1, 1941"?

A. Yes, I see that.

Q. Was such an order issued by the Executive Board?

A. Yes, I believe we said to the President, or instructed [fol. 793] the President to notify the Musicians and members accordingly.

Q. But the recital here that the order was issued by the Board is not, in your opinion, correct?

A. Of the very language in that notice. In other words, I don't think the actual notice was ever submitted to the Board.

Q. The orders of the Board are such as Petrillo prepares subsequent to your taking action. Is that the normal practice?

A. We, the Executive members live in widely scattered parts of the United States and Canada. It is not too frequent we get together, some six or eight times a year. As a consequence of that phase of our membership on the Executive Board we frequently direct him to do a certain thing, and he in connection with the secretary who is close by, formulate the actual language and follow out the instruction.

Q. Now then, at the beginning of what the Official Publication says was the Board's order, there appears a letter, another letter signed by James C. Petrillo, is there not?

A. Another letter? That is the same letter we are speaking of, is it not?

[fol. 794] Q. No, it is not the same.

A. All right. There is a letter signed by Petrillo and the secretary.

Q. Will you read that for the record?

A. "To all Locals of the American Federation of Musicians:

"Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with grand opera companies and symphony orchestras.

"This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the social security laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

"This contract and none other must be used on all such engagements on and after June 1, 1941. * * *"

Q. Signed "James C. Petrillo"?

A. Yes.

Q. Now then at the end of what the Official Journal of the Union sets forth as the Executive Board's order, do you find a paragraph having to do with instructions to the officers of Locals? A. Yes, I do.

[fol. 795-97] Q. What is that paragraph, for the record?

A. "All officers of Locals and all members are required to adhere strictly to this order, as this is the only means by which we can help protect the interests of the members under the Social Security Laws of the United States."

Mr. Charlton: The plaintiffs offer in evidence plaintiffs Exhibit B-37, and particularly pages 1, 18 and 24.

Mr. Padway: No objection.

Mr. Cohen: No objection.

The Court: Admitted.

Plaintiffs' Exhibit B-37.
Filed in U. S. District Court December 13, 1944.

INTERNATIONAL MUSICIAN

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VOL. XXXIX NEWARK, N. J., MAY, 1941 NO. 11

INTERNAL REVENUE DEPARTMENT DECIDES FOR THE FEDERATION

Standard Federation Contract Which Construes Leaders as EMPLOYEES Receives Department Approval

New Form Adopted Must Be Used On All Engagements Effective June 1st

On November 19, 1940, Attorney Ansell, Thomas Gamble (my first assistant) and myself had a meeting with the Treasury Department's attorneys in Washington, D. C. At this conference we discussed the question as to who was to be recognized as employer in a restaurant, cafe, hotel, etc., the contractor on the job, the leader, or the man who owns the establishment.

Of course you well know that the American Federation of Musicians has always contended that the real employer of the then passed a motion that the contract be referred to our Technical Adviser, Mr. Weber, and Attorney Ansell to discuss still further, while the Board and myself remained in executive session. Following the discussion between Messrs. Weber and Ansell the contract was brought back to the Board. The Board after due consideration, approved the contract form and referred it back to the sub-committee for such further action as might become necessary in the interests of the Federation.

Meantime, the Executive Board had instructed the President to have the present contract signed by two orchestras and two employers somewhere in the United States. Now, while the contract was to

[redacted]

SOLOISTS WHO HAVE JOINED FEDERATION

Unionization Goes Forward at Full Speed Following Two Court Decisions in AGMA Case.

In the April issue of the INTERNATIONAL MUSICIAN President Petrillo's report contained a list of soloists who had joined the Federation subsequent to the decision of the Appellate Division of the Supreme Court of New York.

The organization of these musicians has continued and the following instrumentalists have become members in the interim:

Mischa Elman, violinist.
Ossy Renardy, violinist.
Anatol Kaminsky, violinist.
Ruggero Astolfi, violinist.
Ruggiero Ricci, violinist.
Robert Ostrowsky, violinist.
Percy Grainger, pianist, composer, conductor.
Bruno Walter, conductor.
Eugene Goossens, conductor.
Eric Leinsdorf, conductor, Metropolitan Opera.
Ettore Panizza, conductor, Metropolitan Opera.
Gennaro Papi, conductor, Metropolitan Opera.

the job, the leader, or the man who owns the establishment.

Of course you well know that the American Federation of Musicians has always contended that the real employer of the musicians is the man who owns the establishment.

We had a very fine conference during which this matter was discussed from every angle.

Following this conference, it became necessary that I call a special Executive Board meeting. This I promptly did. The meeting was held at the Palmer House in Chicago, Ill., on December 5, 1940, and adjourned December 6, 1940.

At this meeting the Executive Board instructed Attorney Ansell to draft a standardized contract which might meet with the approval of the Treasury Department. The Board also instructed the President to appoint a committee of four, consisting of our Technical Adviser, Joseph N. Weber, Secretary Fred W. Birnbach, Treasurer Harry Brenton and myself, to go into this contract after it was drafted by the attorney. Shortly thereafter this contract was submitted by Attorney Ansell to the committee which in turn made certain suggestions and amendments to same. Technical Adviser Weber then requested that he be permitted to redraft the contract, in accordance with the suggestions and amendments made by Attorney Ansell and the committee, and re-submit same to Attorney Ansell and the committee. I approved of this request.

The committee then met on January 23, 1941, in Miami, Fla. (four days prior to the meeting of the Executive Board for its mid-winter conference on January 27th), and discussed the contract pro and con, making such further changes as seemed advisable, until finally it was in such shape that we could present it to the entire Executive Board, further discussions of the contract taking place when the Board meet as a whole. The contract was finally adopted unanimously.

Thereupon I made an appointment with the Treasury Department in Washington. I left the Executive Board meeting and went to Washington together with General Ansell and on January 31st we presented the contract which we felt convinced would be thought satisfactory to everyone concerned.

We discussed the entire contract with the attorneys at the Treasury Department, the result being that a few minor changes were suggested and agreed to.

At the close of this conference I asked the Treasury Department whether it would not be best for them to meet with our attorney on the following Monday in order that there might be no misunderstanding concerning the changes made and they agreed to do so. I advised Mr. Ansell that when he was through with the Treasury Department to again return to Miami, where the Board was still in session, because it was the wish of the entire Board that this contract be definitely disposed of before the Florida session adjourned. This the attorney did, at which time the contract was again discussed. One or two further minor changes were made. The Executive Board go back to the committee for further changes, the Treasury Department and the Federation were anxious to have the entire matter settled. I, therefore, took the contract in its present form and had it signed in Chicago between the Stevens Hotel and Ray Heatherton, leader of a traveling band scheduled to begin an engagement at this hotel on March 1, 1941.

I also had a contract signed between Michael Todd's Theatre Cafe in Chicago and Les Brown, an orchestra leader, this job starting on February 21, 1941.

On February 20, 1941, I addressed the

(Continued on Page Eighteen)

ALBERT SPALDING—GREAT AMERICAN VIOLINIST

Eric Leinsdorf, conductor, Metropolitan Opera.
Ettore Panizza, conductor, Metropolitan Opera.
Gennaro Papi, conductor, Metropolitan Opera.
Paul Boepple, conductor.
Herman Busch, cellist, Busch String Quartette.
Adolf Busch, violinist, Busch String Quartette.
Karl Doktor, viola, Busch String Quartette.
Gosta Andreasson, violinist, Busch String Quartette.
Erno Balogh, pianist, composer.
Ania Dorfmann, pianist.
Paul Wittgenstein, pianist.
Otto Herz, pianist.
Jeanne Behrend, pianist.
Ellen Ballon, pianist.
Betty Humby, pianist.
Frederick Bristol, pianist.
Consuelo Flowerton, pianist.
Frances Hall (Gruen), pianist.
Mikhail B. Sheyne, pianist.
Karl Inwald, pianist.
Edwin Ziegler, pianist.
Antal Dorati, pianist.
Max Silber, pianist.
Charles Haubiel, pianist.
Otello Ceroni, pianist.
Harry Kaufman, pianist.
Carlos Chavez, composer, conductor, pianist, who is not a citizen of the United States, has been given a one-year permit which expires on April 22, 1942.

For the benefit of those members who overlooked the list in the April issue of the INTERNATIONAL MUSICIAN, we are reprinting it hereunder.

Musicians Who Have Joined The American Federation of Musicians

Jose Iturbi, pianist and symphony conductor.
Eugene List, pianist.
Efrem Zimbalist, violinist.
Vladimir Sokoloff, accompanist for Zimbalist.
Marjorie Edwards, violinist.
Stevenson L. Barrett, accompanist for Miss Edwards.
Victor Granados, cellist and composer.
Rene Le Roy, flutist.
Oscar Straus, composer.
Robert Casadesus, pianist.
Egor Petri, pianist.
Paul Ulinofsky, accompanist for Lotte Lehmann.
Jacques Abrams, violinist.
Bernard Frank, accompanist on Judson Staff.
Guy Maier, pianist, lecturer.
Albert Spalding, violinist.
Andre Benoist, accompanist for Albert Spalding.
Bartlett and Robertson, duo pianists.

(Continued on Page Thirty-two)

Plaintiffs' Exhibit B-37.
Filed in U. S. District Court December 13, 1944.

orchestra, picked her wedding day before the company went on tour. Her husband, Nino Ruisi, an American basso of Italian parentage, is now filling professional engagements in Cuba. The final member of the trio, Irene Jessner, became Mrs. Arthur von Norby a few days before impersonating the bridal Elsa opposite Lauritz Melchior in "Lohengrin". Best wishes for health and happiness to all.

Singing-Usher

JOSEPH CLIFFORD, usher of the 39th Street aisle of the Metropolitan Opera House, gave a song recital at the Lyric Theatre in Baltimore on April 14th, which preceded by a week his appearance as Don José in Denver.

Philadelphia

DEEMS TAYLOR'S new work, a three-act opera, "Ramuntcho", will have its world premiere in the 1941-42 season of the Philadelphia Opera Company. It is a tragic-romantic opera, based on a novel by Pierre Loti, and has its setting in the Basque country of Spain. It will be one of seven operas in next season's repertory to be given in English. The others are: "Faust", "The Bohemian" ("La Boheme"), "The Bat" ("Die Fledermaus"), "The Rose Cavalier" ("Der Rosenkavalier"), "Tales of Hoffmann", and "They All Do It" ("Cosi Fan Tutte").

The overture and ballet music of Mr. Taylor's work, "Ramuntcho", were played at a concert in Carnegie Hall a year ago. The plot of the opera has to do with the hero, Ramuntcho, and his sweetheart. He must go away for military training and his love promises to wait for him. Her mother, however, intercepts his letters and the girl, thinking he has forgotten her, in desperation takes the veil. Ramuntcho eventually returns, but too late.

Popular Puccini

THE Philadelphia Opera Auditions are over and the talents and potentialities of some 304 singers are now being weighed and considered by the judges. Applicants came from many states and various walks of life. There was a 23-year-old barber from Cedar Rapids, Iowa; a 22-year-old nurse on probation in Baltimore's Mercy Hospital; a 26-year-old designer of evening gowns for a leading New York manufacturer; a 19-year-old telegraph messenger boy from Pensacola, Florida; and a 30-year-old second vice-president of a department store in Youngstown, Ohio.

According to Sylvan Levin, musical and Thomas Martin as assistant conductor. The St. Louis Opera Guild has been busy during the current season and has done much to bring opera performances to the general public. Outstanding for her work in guild activities has been Ruth Kelley Martin, concert violinist and wife of the assistant conductor.

Kerstin Thorborg

KERSTIN THORBORG, Swedish mezzo-soprano, whose glorious voice recalls another Swedish nightingale, Jenny Lind, is probably the only singer to begin a career in a perambulator. One day, as the baby was being wheeled about the streets of Stockholm, singing as usual for the amusement of passersby, Carolina Oestberg, prima donna of the Royal Opera, hearing her, said, "I think that little girl will become a real opera singer some fine day." Miss Thorborg's father owned and edited the local newspaper and sang for recreation. Her mother, too, loved music. The family also included two sons and Kerstin vied with her brothers at games and sports to such an extent that she became an expert skater, skier and a fearless horsewoman. This physical prowess prepared her for the strenuous life of an opera singer, which demands a well-coordinated body and a healthy mind.

Her career began when, as a schoolgirl, she engaged in competition with 1200 applicants for entrance into the opera school of the Stockholm Royal Opera. She was one of the three accepted, and so rapid was her progress, that in a few years she was permitted to make her stage debut as Amneris in "Aida".

Four years later she accepted an engagement at the Prague opera, followed by triumphant entries into Berlin, Buenos Aires, Vienna, Salzburg and London. With 1936 came her first visit to America as a member of the Metropolitan Opera, during which she made a sensational New York debut as Fricka in "Walküre". Now completing her fifth consecutive season here, Madame Thorborg plans to spend the summer in the United States instead of returning to her home in Sweden.

On a recent Metropolitan tour, she was heard in Boston as Venus in "Tannhäuser" on March 28th, as Brangäne in "Tristan und Isolde" on April 2nd, and as Ortrud in "Lohengrin" on April 14th. In Cleveland she sang "Brangäne" on April 15th and Fricka in "Die Walküre" on the 17th. In Atlanta her only role was Ortrud on April 30. After the opera tour, she will close her season with an appearance at the Cincinnati May Music Festival where she will sing in "Bach's B minor Mass" and [illegible]

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you before the Bureau in this matter, the ruling in the case is being furnished direct to you. Mr. Petrillo is being advised to this effect.

Under the terms of the contract the hotel engaged the personal services of eight musicians and a girl vocalist under your leadership. The contract specified the place where the engagement is to be performed, the dates of the engagement, and the lump sum weekly payment for the services of the orchestra. It is expressly stated in the contract that the hotel shall have complete control of the services to be rendered thereunder. It also provided that you, as leader, shall distribute the amount received from the hotel to the musicians in accordance with the list appearing on the reverse side of the contract. Such list shows the names of the members of the orchestra, their social security account numbers, and their individual compensation. The contract was signed by a representative of the hotel and by an employee of the Music Corporation of America, a booking agency, as your representative.

Upon the basis of the terms of the contract it is clear that the hotel has the right to exercise over you and the musicians performing under your direction the control and direction prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. It is, therefore, held that you and the other members of the orchestra are employees of the Stevens Hotel for purposes of the taxes in question.

Respectfully,

(s) GUY T. HELVERING,
Commissioner.

to Collector,
Chicago, Illinois.

BARGAINS Regulation BAND COATS, A. F. of M., Blue or Black, $2.50; Brand New Band Caps, all colors and sizes, $1.50; 40 Black Lapel Coats, $30.00; 35 Maroon Lapel Coats, $100; 30 Boys' Band Coats, Blue, $35.00; 41 Maroon CAPES, $100; Double Breasted, New, Tuxedo Suits, $18.00; Majorette Costumes, $3.00; Used Shakos, $3.00; New Shakos, $5.00; 65 Blue CAPES, $5 CAPS, all $200. FREE LISTS.

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epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

president of a department store in Youngstown, Ohio.

According to Sylvan Levin, musical and artistic director of the Philadelphia Opera Company, 80 per cent of the applicants had had no previous operatic experience. Although the company is not yet ready to announce the finalists who will be taken on for the 1941-42 season, it is the belief of Levin and his associates on the auditions committee that at least 60 per cent of the singers heard possess voices of "true operatic possibilities". In the case of the remaining 40 per cent, the Philadelphia conductor declares, "There is regrettable evidence of many good voices ruined or on the verge of being ruined by bad training."

Among the amusing side-lights of the auditions as reported by Mr. Levin is the fact that 97 out of the 122 sopranos chose the same aria for their hearings, "Un Bel Di" from "Madame Butterfly" and that 61 out of 86 tenors sang Rodolfo's narrative from "La Boheme", both by Puccini.

New Jersey

THE Newark Civic Opera Company, in conjunction with the New Jersey Opera Association, presented a performance of the "Barber of Seville" on April 25th in Newark, N. J., with a cast headed by Jessica Davis, Claudio Frigerio, Franco Perulli, Nino Ruisi and Pompilio Malatesta.

Chicago

THE San Carlo Opera Company recently closed its engagement in Chicago, during which time it presented ten performances of standard Italian and French operas, and a small number of English productions. The season extended from April 12th to 20th.

St. Louis

THE Spring season of the St. Louis Grand Opera Association opened April 16th with a performance of "Don Giovanni". The leads were sung by Ezio Pinza, Tito Schipa and Nicola Moscona. "Mignon" with Gladys Swarthout, Christina Carroll and Armand Tokatyan was heard on April 21st, followed on the 24th by "La Traviata" with Helen Jepson, James Melton and Carlo Morelli. The double-bill "Cavalleria" and "Pagliacci" was given April 26th. The Mascagni favorite enlisted the services of Dusolina Giannini, Kurt Baum and Alexander Sved as principals, while "Pagliacci" included Giovanni Martinelli, Alexander Sved, George Czaplicki, Vivien della Chiesa and Mr. Cavadore. The orchestra was under the leadership of Laszlo Halasz with close her season with an appearance at the Cincinnati May Music Festival where she will sing in "Bach's B minor Mass" and Elgar's "Dream of Gerontius".

INTERNAL REVENUE DEPT. DECIDES FOR FEDERATION

(*Continued from Page One*)

following communication to the Honorable Commissioner of Internal Revenue:

February 20, 1941.

The Honorable Commissioner of
Internal Revenue,
Bureau of Internal Revenue,
Washington, D. C.

My Dear Mr. Commissioner:

As President of the American Federation of Musicians, and acting at the personal request of the musicians themselves, I am enclosing herewith two contracts entered into by members of the Federation with establishments employing their services as musicians in Chicago, Ill. These are actual existing contracts and I am requesting that the Bureau give consideration to these contracts and make a ruling with respect to the question whether or not under these contracts the establishments for which the musical services are rendered, are as a matter of law, the employers of the members of the Federation whose personal services are therein contracted for.

It is the view of the American Federation of Musicians, and my own and also the view of the members of the Federation who have entered into these contracts that under same there can be no reasonable question but that the musicians, including the leaders of the orchestras, are all employees of the contracting establishments and that these latter establishments are the employers of these musicians.

This ruling is requested in order that the employer's tax liabilities under the Social Security Act may be properly determined.

Very respectfully yours,
JAMES C. PETRILLO, President,
American Federation of Musicians.

On April 11, 1941, the following answer from the Honorable Commissioner was received by one of the two band leaders; it is self-explanatory:

TREASURY DEPARTMENT
WASHINGTON

April 12, 1941.

A&C:RR:3
Mr. Ray Heatherton,
Stevens Hotel,
Michigan Boulevard at Balbo Drive,
Chicago, Illinois.

Sir:

This office has received a request from Mr. James C. Petrillo, President, American Federation of Musicians, for a ruling as to the status, for purposes of the taxes imposed by Sub-chapters A and C of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of you and the musicians performing under your direction at the Stevens Hotel, Chicago, Illinois, pursuant to a contract dated January 20, 1941. A copy of such contract has been submitted to this office.

Since no power of attorney has been submitted authorizing Mr. Petrillo to represent you in connection with the matter, a copy of this letter is being sent to the Collector, Chicago, Illinois.

Commissioner.

A similar letter was received by Les Brown, leader of the orchestra at Michael Todd's Theatre Cafe in Chicago.

I think now that the question as to who is the real employer—the leader, or the owner of an establishment—had been made quite clear by this ruling and by the adoption of this contract.

In accordance with these conclusions all members of the American Federation of Musicians are herewith instructed that, at the expiration of their present contracts with hotels, cafes, restaurants, etc., this standardized form contract be accepted and put into force, and from then on the contractor or leader will not be held responsible for the payment of the Social Security Tax on such engagements.

For the information of members of the American Federation of Musicians I am inserting here a copy of the contract, exactly as it was accepted and signed in Chicago:

CONTRACT BLANK
AMERICAN FEDERATION OF MUSICIANS
LOCAL 10

THIS CONTRACT for the personal services of musicians, made this 28th day of January, 1941, between the undersigned employer (hereinafter called the employer) and eight musicians, plus leader, plus girl vocalist (Including Leader) (hereinafter called employees), represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of RAY HEATHERTON according to the following terms and conditions:

Place of employment—STEVENS HOTEL.
Date(s) of employment—Begin Saturday, March 1, 1941, to April 11th inclusive.
Price agreed upon—$1,050 weekly, which price includes transportation.
(Terms and amount)
To be paid—Weekly.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of employer—STEVENS HOTEL.
By
Street Address—Balbo and Michigan.
City or State—Chicago, Illinois.
Phone
Accepted by Employer—P. JONES (s).
Accepted—RAY HEATHERTON,
Orchestra Leader.
By—M. B. CIJNAY,
Representative of Employees.

(Appearing on back of contract is the following):

Names of Employees	*S. S. Number*	*Wages*
Ray Heatherton (Leader)	113-01-4532	$119.22
Conrad Silke	113-07-2240	96.12
Art Lee	092-05-2240	96.12
Art Kerr	072-12-6589	89.52
Carmine Furia	089-05-3186	89.52
Vincent Bishop	035-14-2970	89.52
Larry Molonelli	054-07-8684	96.12
Ed. Griffin	212-14-3609	89.52
Bill Telfer	113-04-9652	89.53
Judy Clark	103-12-7629	50.00
* Transportation, commission, miscellaneous		144.82
	Total	$1,050.00

The above explanation makes it clear that the solution of our social security problem lies in the adoption of a standardized Federation contract which must be used by all musicians on all engagements. The International Executive Board has adopted the contract form which is shown above.

Members are therefore advised that on and after June 1, 1941, all members of the Federation must sign contracts for all engagements, traveling or local, on this contract form and none other.

The licensed booking agencies will also be required to use this contract form. Members must refuse to play any engagement if the engagement is contracted on any other form after May 31, 1941.

Kindly be governed accordingly.

Fraternally yours,
JAMES C. PETRILLO, President,
American Federation of Musicians.

Plaintiffs' Exhibit B-37.
Filed in U. S. District Court December 13, 1944.

International Musician

Entered at the Post Office at Newark, N. J., as Second Class Matter.
"Accepted for mailing at special rate of postage provided for in Section 1103, Act of October 3, 1917, authorized July 10, 1918."

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— OF THE —
American Federation of Musicians

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J. W. PARKS.....Hamilton Hotel, Washington, D. C.
OSCAR F. HILD.....206 Atlas Bank Building, Cincinnati, Ohio
WALTER M. MURDOCH....22 Royal York Rd., No., Toronto, Ont., Can.

An able man shows his spirit by gentle words and resolute actions.

—CHESTERFIELD.

Social Security Protection

BY order of the International Executive Board the following notice was sent to all Locals of the American Federation of Musicians on May 1, 1941:

absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer
Street Address
City or State
Phone
Accepted by Employer
Accepted
(Orchestra Leader)
By
(Representatives of Employees)
FORM B

The reverse side of the contract contains the following:

NAMES OF EMPLOYEES	S. S. NUMBER	WAGES
(Leader)		

All officers of Locals and all members are required to adhere strictly to this order, as this is the only means by which we can help protect the interests of the members under the Social Security Laws of the United States.

Anti Roll Tax Bill

to ourselves. At this time fire prevention becomes a national responsibility, because of national defense. Fire is the "saboteur" par excellence. Fire wastes. Fire delays. Fire destroys. It consumes that most precious of elements—time. It gives no quarter. It is the most ruthless of conquerers.

Luckily, fire isn't invincible. It wins its victories because of human laziness, human ignorance, human carelessness, human irresponsibility. It feeds on these common failings. Correct those failings—and fire is licked to a frazzle.

This campaign against fire must be constant. We can't afford to put it off until tomorrow. We can't afford to pass the buck or take it for granted that others will do our part of the job for us. Keep always in mind that every fire we prevent marks a definite contribution to national defense.

Lastly, in this war against fire, don't do too little—and don't do it too late. As the phrase goes, time is of the essence. And time is something we can't buy back. It would be a tremendous achievement if, at the end of 1941, we could look back and say, "This was the year in which fire met its master".

Atmosphere

(*From the* PAINTER AND DECORATOR)

FEW drivers of automobiles realize that the chief enemy of speed in their cars is the unseen and silent atmosphere. Physicists have proved that, after a car has reached a speed of forty miles an hour, more power is needed to overcome air-resistance than road-resistance. If a car is going fifty miles an hour, between fifteen and twenty-three horsepower is used simply to overcome air-resistance, and that is more than one-fourth the horsepower of the ordinary engine.

In many ways automobiles remind us of men, especially in this particular. When far-seeing men try to bring about some reform, their work in advancing the reform is more than half spent in overcoming the pervasive, silent, obstinate opposition of prejudice and selfishness. The atmosphere of society must be overcome before any progress can be made with the reform. When this persistent and universal force works at last with the improvement, the reform is virtually accomplished.

To All Locals of the
American Federation of Musicians:

Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with grand opera companies and symphony orchestras.

This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the Social Security Laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

This contract and none other must be used on all such engagements on and after JUNE 1, 1941. Any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for said violation. All engagements booked by licensed agencies must be contracted on these forms.

A supply of these contracts may be secured from the International Secretary's office.

Kindly be governed accordingly.

Fraternally yours,

JAMES C. PETRILLO,
President, A. F. of M.

Attest:
FRED W. BIRNBACH,
Secretary, A. F. of M.

The contract mentioned therein is Form B, which reads as follows:

CONTRACT BLANK
AMERICAN FEDERATION OF MUSICIANS

Local Number

THIS CONTRACT for the personal services of musicians, made this day of , 194 , between the undersigned employer (hereinafter called the employer) and musicians (hereinafter called employees) (including Leader) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of according to the following terms and conditions:

Place of employment
Date(s) of employment
Hours of employment
Price agreed upon $
(Terms and amount)

To be paid
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness,

Anti-Poll Tax Bill

THE payment of a poll tax as a condition precedent to voting is required in eight States out of forty-eight in the Union.

The tax ranges from $1.00 a year non-cumulative to $2.00 a year cumulative. In States where poll tax payment is a requirement, the percentage of voters who cast their ballots in the 1940 election was 21.1%. In the forty non-poll-tax States, the percentage was 70.59%. It is obvious that the poll tax is a disfranchisement to practically 50% of the voters in the eight States.

Congressman Lee E. Geyer of the 17th District of California has introduced the Geyer-Pepper Anti-Poll Tax Bill. It has been endorsed not only by the American Federation of Labor, but also by the Railroad Brotherhoods and the Congress of Industrial Organizations. The bill is bottled up in the House Judiciary Committee. The signatures of 218 Congressmen are required to bring the bill to a vote in the House.

We suggest that you write your Congressmen, requesting them to sign discharge petition No. 1 in order to release from disfranchisement 50% of the voters in the eight States above mentioned.

The 1941 Convention

WITHIN two weeks from our publication date will commence the annual trek to the Convention in Seattle. In these times of strife and stress each Convention becomes more important than the last.

Our Conventions have always been constructive, and there is no doubt in the mind of your Editor that the 46th Annual Convention will prove no exception to the rule. Our Conventions are the congress of the professional musicians. Democratic procedure at its best is exemplified by our deliberations. Delegates attending for their first time are always impressed by this fact.

We are again calling to the delegates' attention the fact that evenings in Seattle in June are cool. Topcoats are more often than not required and delegates should arrange their wardrobes accordingly.

Saboteur Par Excellence

AT the end of May the National Board of Fire Underwriters will celebrate its 75th anniversary. And that celebration should be shared by the whole country—no organization has done as much to fight fire on all fronts, and to encourage communities, industries and individuals to protect their properties against an enemy which is menacingly "on the job" 24 hours a day, 365 days a year.

Furthermore, the end of the National Board's first three-quarters of a century of achievement in the public interest should serve to encourage the entire country to join in a continuous, unremitting fight against fire that will get results far superior to any attained in the past.

At any time, fire prevention is a duty and an obligation we owe to our neighbors and our community, no less than

Dr. Charles Stelzle

IT is with deep sorrow that we announce the death, on February 27th, at the age of 72, of Dr. Charles Stelzle, long a contributor to these columns. A Presbyterian minister, Dr. Stelzle had for forty years been closely affiliated with the American Federation of Labor. He was superintendent of the department of church and labor of the Presbyterian Church, delegate to the annual labor conventions, field secretary of the Federal Council of the Churches of Christ in America, public relations counselor and a writer for more than 300 monthly and weekly labor journals. He will be remembered especially for his keen insight into national problems, for his fearless denunciation of evils, political and social, and for his championship of the causes of labor and democracy. The following article, received at this office the day after his death, reveals better than anything we can say the calibre of the man.—THE EDITOR.

If a Man Die

By DR. CHARLES STELZLE

If a man die shall he live again? No—because he shall never die. There's something in man that lives forever.

You are the same man that you were twenty years ago, but your body has been replaced several times during this period. Your brain is rebuilt twice each year.

But Memory remained with you clear through this transformation.

Nothing is ever destroyed. Coal burns, but the ashes and smoke and gases precisely equal the original bulk. They have simply taken on another form.

Arguing from the indestructibility of matter, can you believe that memory and heart treasure and soul culture perish?

When a tree has borne leaves and fruit, its work is done. But not even the wisest man who ever lived had finished his work when "death" came. He was just beginning to understand.

Can this be all of life for him? Is there nothing left but a hole in the ground? Does this seem in harmony with God's method, which in everything else brings us on from glory to glory?

Many of man's faculties are like unwrapped tools in a chest, unexamined, unnamed, waiting for use in a future world.

We know that perfection cannot be realized in the present world. There must be something ahead—the immortality which will permit us to see the fulfillment of our dreams.

And this new world would be incomplete without those who struggled to bring men nearer to perfection in the present world.

[fol. 799] Q. Now, Mr. Hild, do you find on the same page 24 from which you last read a reference to the gathering of the 1941 Convention of the American Federation of Musicians?. A. Yes, I do.

Q. The statement is made there that two weeks following the date of the publication of that 1941 issue, the convention was due to convene; is that right?

A. That is correct.

Q. Now then did you find any reference to any By-Laws or By-Law changes in any of those pages of the May 1941 issue recording what had happened in connection with Form B contract?

[fol. 800] A. No.

Mr. Padway: I was just thinking that question over. Did you find any? I think that calls for a legal conclusion, and I ask the court to permit the objection to the question and the answer for this reason, what was done is there.

Mr. Clarkson: The question and answer may go out so far as that is concerned. It may go out.

Q. From time to time some, at least, of Petrillo's orders were published in the Official Journal of the Musicians Union, were they not?

A. Yes, as was this one.

Q. You can see that? A. Yes.

Q. You know that the By-Laws require the secretary to certify and publish the official proceedings of the Executive Board, don't you?

A. Certify and publish?

Q. Yes.

A. No, no. That is not true.

Q. Some of them are kept secret too?

A. Frequently are not published.

Q. As a high officer of the Union where would you go to find out whether or not your President had issued bind-

[fol. 801] ing orders?

A. As an officer of the Federation I don't think I would have to go because I believe that I would be advised of those by telegram or letter.

Q. Where would a poor member have to go?

A. He would go either to his Local secretary or to the National office.

Q. Now then do you claim that the Local secretaries were given notice in writing advising them of any change in By-Laws at any time during 1941?

A. Yes, I think they were. It would be unusual if they were not given any notice of any changes in By-Laws.

Q. That notice which you think was given would be in writing, would it not?

A. Probably so.

Q. Do you have such notice? A. No.

Q. Does the counsel for intervener have such notice?

Mr. Padway: We contend the letter is the notice.

Mr. Charlton: That letter?

Mr. Padway: We contend that letter notified them of the adoption of the Form B and Form B changes.

Mr. Charlton: You claim no further notice to the members of the Union than that notice which has been read [fol. 802] in evidence.

Mr. Padway: And the magazine changes of the official document which you have also offered in evidence.

Mr. Charlton: Now I am claiming no further notice than that was given at any time during 1941 to booking agencies. You claim no further notice to booking agencies, do you?

Mr. Padway: There is no further notice than this, the International Musician which goes to booking agencies, that magazine, the letter which was directly addressed to the booking agencies, and the letter which was addressed to Locals, which was slightly different in texture. They also got notice of that.

Mr. Charlton: That is the notice which you rely upon as sent to the booking agencies?

Mr. Padway: With the change, or the adoption of the means or the method of contracting and the terms and conditions of the contract that governs members.

Mr. Charlton: Do you claim any other notice was sent to booking agencies?

Mr. Padway: I don't know of any other notice given. I will agree with you that none other was given.

Mr. Charlton: That concession is accepted.

Q. Now then at the close of the 1941 convention a revised official copy of the Constitution, By-Laws and Stand-[fol. 803] ing Rules of the Musicians Union was prepared and published, was it not? A. It was.

Q. That preparation and publication was under the direction and supervision of the secretary?

A. It was.

Q. That preparation occurred subsequent to the date of the Petrillo letter which you have read in evidence and subsequent to the '41 convention? A. Yes.

Q. You know that various revisions of the By-Laws were made in that 1941 edition, don't you?

A. I do.

Q. For example, you know that Section 11 or Article IV of the By-Laws was deleted in the 1941 edition as compared to the 1940 edition, do you not?

A. I don't recall the section. If you can give me the subject matter I can probably answer.

Mr. Charlton: I will withdraw that last question for the present.

Mr. Padway: We will agree that there were various revisions every year. We know that. We are not conceding that action taken by the convention revising it is put in the book.

[fol. 804] Q. Now then turning to Section 29 or Article X of the 1941 official copy of the By-Laws, do you find something in there relating to employment of members of the Union by establishments? A. I do.

Q. Or rather prohibition of employment of members of the Union by establishments? A. I do.

Q. That is the same old friend that Mr. Padway mentioned that had been in the By-Laws for fifteen or twenty years? A. Yes.

Q. In 1942 your secretary further revised and brought up to date your By-Laws and there was an official publication of them given, was there not? A. There was.

Q. And that action was following the 1942 convention?

A. Yes.

Q. That is the regular practice to wait until after the annual convention to revise? A. Yes.

Q. And re-edit and re-publish the By-Laws?

A. That is correct.

Q. In the 1942 Official Publication of the By-Laws do you find that Section 29 of Article X is the same old, [fol. 805] fifteen year old, or sixteen year old friend?

A. Yes, it is here.

Q. No different from the one of 1941?

A. That is right.

Mr. Padway: Would it be all right to offer the book now in connection with the witness' testimony, Intervener's Exhibit No. 6, Constitution and By-Laws?

Mr. Charlton: All right.

[fol. 806] Interveners' Exhibit 6.

Filed in U. S. District Court December 13, 1944.

Constitution

By-Laws and

Standing Resolutions

of the

American Federation of Musicians

of the

United States and Canada

As Amended and Adopted at the Forty-seventh Annual Convention, Held at Dallas, Texas, June 8-13 1942

* * * * * * *

By-Laws

Article I—Duties of Officers and Organizers.

Section 1. Duties of President. It shall be the duty of the President to preside at all meetings of the Federation and Executive Board; sign all documents of an official character pertaining to the Federation; sign all vouchers; appoint all committees unless otherwise ordered. It shall be his duty and prerogative to exercise supervision over

the affairs of the Federation; to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members and/or Locals; any such order may be its terms (a) enforce the Constitution, By-Laws, Standing Resolutions, or other laws, resolutions or rules of the Federation, or (b) may annul and set aside same or any portion thereof, except such which treat with the finances of the organization and substitute therefor other and different provisions of his own making; the power so to do is hereby made absolute in the President when, in his opinion, such orders are necessary to conserve and safeguard the interests of the Federation, the Locals and/or members; and the said power shall in like manner extend to and include cases where existing laws are inadequate or provide no method of dealing with a situation. He shall call special sessions of the Executive Board when necessary; call strikes; draw upon the funds of the Federation to pay the salaries of traveling members accompanying a theatrical organization when called on to strike while on the road, and for the payment, if necessary, of hotel and traveling expenses of other members who are called on strike by him during any emergency when outside of their own jurisdiction and play engagement for which no tax is collected by the Federation, and for which otherwise no strike benefits are paid; draw funds in payment of all expenses occasioned by the exercise of his duties; perform such other duties as may elsewhere be provided for in the Constitution, By-Laws and Standing Resolutions of the Federation; have the casting vote of a tie, and at the end of his term of office he shall report his acts and doings to the Annual Convention of the Federation, and upon convening of the Convention he shall appoint the following committees, viz.: First, Credentials; second, Finance; third, Laws and Supervisions; fourth, Measures for the benefit of the Federation, and such other committees as may be voted for by the Convention.

* * * * * * *

Sec. 3. Duties of the Secretary. The Secretary shall keep a faithful record of the proceedings of all meetings; answer all communications appertaining to the Fed-

eration; issue all charters upon receipt of a certified list of applicants for membership; inform all locals of all additions to the Federation, as well as all properly presented claims for default of services rendered by members; notify the delegates of all meetings; issue monthly statements of erased, suspended, expelled and transferred members in tabulated form; attest all bills and orders; cause the minutes of each convention to be printed in full and distributed to the Locals not later than thirty days after adjournment; publish not later than the July issue of the International Musician, all laws that have been amended, added to, or in any way changed; he shall send to each Local Secretary every six months a copy of the galley list of the Local for inspection; he shall in his annual report, under the heading of "List of Locals," designate the jurisdictions of every Local as recognized by the A. F. of M.; he shall add to the list of Locals the name of each Local as it is known in its jurisdiction; procure and preserve the necessary books, papers and other documents appertaining to his office, and transmit them to his successor when properly qualified to receive the same, clear of all incumbrance. And for the faithful performance of his duties he shall receive a salary of fifteen thousand dollars ($15,000.00) per annum, payable semi-monthly; he shall be authorized to employ stenographers, typists and such other clerical assistance as may be necessary, at his own discretion; he shall notify all Presidents of Locals to incorporate an order of business through which members will be instructed to patronize none but union men and purchase only such goods as bear the union label.

* * * * * *

Article IX—Rights and Duties of Locals

* * * * * *

Sec. 24. Locals have a right to insist that Local leaders or contractors engage local members to fill miscellaneous engagements outside of the local jurisdiction.

* * * * * *

Sec. 27. A Local has the right to prevent a member from colonizing musicians in its jurisdiction. A leader, manager or agent (member of the Local) must obtain the consent of his Local before engaging musicians from out-

side for permanent or single engagements. But a member so imported shall not be required to deposit a transfer card unless the engagement extends over four weeks. Such member must not fulfill any other engagement until his transfer card has been deposited unless permission is granted by the Local.

* * * * * * *

Article X—Rights and Duties of Members.

* * * * * * *

Sec. 13. Leaders, contracting members or other members of a Local who demand, request, induce or try to induce other members not to play with or for any leader or contracting member, or with or for any other member or members, shall be fined not less than $25.00 nor more than $100.00, or be suspended or expelled from membership by the Local with which they are affiliated.

* * * * * * *

Sec. 20. Members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M. (See Article XVI—Contract Forms.)

Penalty: Fine of not less than $100.00.

* * * * * * *

Sec. 23. A contracting member who assumes the responsibility for the payment of a member's services is bound by his action, and cannot escape his obligation by claiming the protection of any Local or A. F. of M. law.

Sec. 24. A. Leaders of orchestras or bands playing season engagements on boats plying between different ports may engage members from any Local. Where Locals are maintained in such ports the highest price in existence among them governing such work shall prevail. However, if the International Executive Board deems the price maintained by any one Local contrary to the interests of any other Local equally interested, then the International Executive Board shall assume jurisdiction over the engagement and name a price equally binding upon all Locals and members.

* * * * * * *

Sec. 29. Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished, provided that in states or provinces where laws exist, which prescribe a different method of contracting, or where the provisions of law are such that to contract as above prescribed would be contrary to the interests of members, Locals are authorized to establish such method of contracting as may best conserve the interest to members. However, members may accept engagements from traveling theatre company managements direct, provided their contract, in addition to the signatures of the contracting parties, is countersigned by the musical director of the company or the member of the Federation who engages the members for the company. Furthermore, members may contract with symphony orchestra management direct in conformity with all Local and Federation laws.

If a member violates the above, such action shall constitute his resignation from membership in such Locals where he held membership, and in the American Federation of Musicians.

Sec. 30. A member of the Federation cannot accept an engagement to join a traveling band or orchestra from a non-member, neither can he negotiate with a non-member for such an engagement.

A member shall be deemed guilty under the provisions of this law if he negotiates for such an engagement as named in the law with a non-member, even though he subsequently signs a contract for the same engagement with a member of the Federation.

A fine of $100.00 shall be imposed upon a member who violates this law, and if failing to obey the instructions of a Local or an officer of the Federation to forthwith surrender such engagement it shall be considered equivalent to his resignation from all Locals wherein he held membership, and in the American Federation of Musicians, and

all Locals and members of the Federation must therefore consider him a non-member.

* * * * * * *

Sec. 45. Any member, leader or contractor employing members of the A. F. of M. on any traveling, location or out-of-town engagement shall employ only such members who are in good standing in their respective Locals and carry their Local Union Cards paid up to date. For any violations of this section he shall be subject to a fine of not less than $10.00, nor more than $50.00 for each and every violation.

* * * * * * *

Sec. 48. Members of the American Federation of Musicians who accept engagements for bands or orchestras must in person sign their contracts for same or give some agent power of attorney to sign their names. They are responsible for the fulfilling of the contract under union conditions, and ignorance of the terms of any contract signed by an agent shall not be valid excuse. The contract must be submitted to the Local Union for inspection in accordance with the rules of the Federation. All collections for the engagement must be made by the member who furnishes the orchestra and not by the agent. Members of the orchestra must be paid by the contracting member or leader of the band or orchestra and not by the agent. All agents who go into collusion with members to defeat the object of this or any other law of the American Federation of Musicians shall be held as unfair to it by the Federation, and thereafter members cannot accept engagements from or through them.

The price of an engagement must cover the services rendered by musicians, and nothing else. If an orchestra carries added attractions, such as singers, etc., the contract must show an additional charge to cover their services. Leaders, their agents or contracting members, are prohibited from furnishing singers free of charge on any and all engagements.

If members fail to contract for engagements as herein prescribed or in any way violate the provisions of this law, such action shall constitute their resignation from member-

ship in such Locals wherein they held membership, and in the American Federation of Musicians, and they shall be held as unfair to the Federation.

Article XII—Transfer Members.

Sec. 18.

Traveling members other than leaders must sign contracts with contractors, members of the A. F. of M.

Article XIII.

Traveling Orchestras And Members.

Traveling Cards And Tax.

Members Playing Out-Of-Town Engagements.

Sec. 10

C. A contractor or leader, as the case may be, in every case before an engagement is played, must submit his contract for same to the Local Union in whose jurisdiction same is played, or in the absence of a written contract file a written statement with such Local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hours of the engagement, as well as the names of the members who will play same and the Locals to which they belong who will play same and the Locals to which they belong, their Social Security numbers and the actual amount of money paid each individual sideman, which cannot be less than the minimum Local scale plus the Federation surcharge.

In addition to furnishing the foregoing information, a contractor or leader, as the case may be, must, before the engagement is played, inform the Local in whose jurisdiction the engagement is played the amount collected as to transportation charges and a point from which the transportation charges are made, and the exact and correct

amount of percentage which will be paid to an agent or agents as compensation for booking the engagement.

* * * * * * *

I. In the selecting of the members of the orchestra, the leader or manager of same need not confine himself to the membership of the Local in whose jurisdiction the orchestra is organized.

* * * * * * *

K. All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two weeks' notice to the other.

L. * * * * *

A member cannot form a traveling dance orchestra in the jurisdiction of the Local to which he belongs, and make such jurisdiction the headquarters of the orchestra, and compete for and fill local engagements with same.

M. * * * * *

Note—In all else the Constitution, By-Laws and Standing Resolutions of the A. F. of M. shall apply to the members of a traveling orchestra.

* * * * * *

Article XVI—Official Forms.

Official Contract Blank for All Engagements.

Contract Blank

American Federation of Musicians

Local Number .....

This Contract for the personal services of musicians, made this ..... day of ....., 194...., between the undersigned employer (hereinafter called the employer) and ..... musicians (including Leader) (hereinafter called employees) represented by the undersigned representative.

Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the

employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of ....., according to the following terms and conditions:

Place of Employment .....
Date(s) of Employment .....
Hours of Employment .....
.....
.....
.....
Price Agreed Upon: $.....
(Terms and Amount)
To be paid .....
(Specify When Payments Are To Be Made)
.....

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and

nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer ..... Accepted by Employer .....
Street Address ..... Accepted .....
City or State ..... (Orchestra Leader)
Phone ..... By .....
(Representatives of Employees)

Article XVII- Miscellaneous.

Section 1. Performers on musical instruments of any kind who render musical services for pay are classed as professional musicians and are eligible for membership, subject to the laws of and jurisdiction of the A. F. of M.

Article XIX.

Standing Resolutions

Number 58.

To promote his business, a leader may borrow money in any manner not contraventive of Standing Resolution No. 58 or any other law, rule or resolution of the Federation, but he must not make any arrangement and/or agreement directly or indirectly subjecting him to interest and/or bonus of more than 10% per annum nor more than a total of 25% of the total sum borrowed and which is to be repaid.

Leaders of bands or orchestras are prohibited from employing, either directly or indirectly, or through any device or method whatsoever, personal representatives who are not licensed by the Federation.

Leaders of bands or orchestras are prohibited from directly or indirectly, through any device or method whatever, acquiring any financial interest of whole or part ownership in any other band or orchestra, provided that a leader may wholly, but not in part, own any other band which accepts or fills engagements under his own name.

* * * * * *

[fol. 807] Q. Now in the 1942 revised edition, do you find an Article IV of the By-Laws as revised and published there, a number of paragraphs which do not appear in the 1941 edition of the By-Laws?

A. No. I don't see any difference.

Q. Article IV?

A. Article IV, page 44. They seem to run the same.

Mr. Chanlton: I will withdraw the question.

Q. You find in Article IV of the Constitution as published in 1942, a number of paragraphs which do not appear in the 1941 edition?

A. Yes, I see them here now.

Q. And there were revisions made in that Article IV of the Constitution prior to the publication of the 1942 official copy of the By-Laws and Constitution?

A. Yes, sir.

[fol. 808] Q. Now then I think you testified on direct examination that certain revisions, further revisions appeared in the 1944 copy, official copy of the By-Laws, Constitution and Regulations of the Union?

A. Yes.

Q. Now do you claim that the '44 job was partial and incomplete in any way?

A. I think all of them were incomplete, sure.

Q. Now then you mean by that, that no person can determine from an examination of the Official Published By-Laws what are the existing By-Laws of the Union from time to time?

A. Well, I think as a general matter, yes. As to the specific section I think one would frequently find omissions. Our people some times refer to those as the horror book, you know.

Mr. Charlton: I would not disagree with that.

Mr. Padway: And for a different reason?

Mr. Charlton: That is correct.

Q. Do you know of any secret or public action prior to 1944 which are reflected in the 1944 copy of the By-Laws—do you?

A. There might have been some with reference to transcriptions and recordings.

[fol. 809] Q. Do you know of any others, other than that?

A. Prior to 1944? Yes.

Q. I am asking you to tell the court of any omission in the By-Laws as published in 1944 which you know about at this time?

A. None excepting those regarding transcriptions.

Q. So far as you know the orders which have had to do with By-Laws, except recording By-Laws, are reflected in the 1944 edition; is that correct or not?

A. That is correct.

Q. In the course of your discussions there at Miami did anyone ever raise the objection to this whole plan as to the Form B contract and related matters, that the courts might refuse to enforce a contract which caused the party to agree to abide by the whimsical, capricious, or wise secret decisions of Petrillo in the future conduct of their business?

Mr. Padway: Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination, and not embraced with any issue in this case.

Mr. Charlton: He said they had a full discussion and I would like to know if that question was raised.

The Court: All right. Answer. (Intervenor excepts.)

[fol. 810] A. No such question was ever raised.

Q. Did anyone indicate that it would take a pretty shrewd lawyer to ever find out that a By-Law had been changed prior to the publication of the fact that it had been changed?

A. There had been no By-Laws changed prior to any publication at this time.

Q. You know of no notices other than those which appear and which you have identified and testified concerning, given to your membership or to the booking agencies of any By-Law change other than those which you have mentioned here in your testimony, do you?

A. No. Including, of course, the fact that I deem Form B contract a change in By-Law. I was trying to get at that.

Q. That Form B contract does not refer to any change in By-Laws, does it?

A. No, but the Form B contract specifies control of activities of musicians and advises methods of contracting.

Mr. Charlton: Read the question.

(Question read by the reporter.)

A. The answer was that it specifies a change in the control of the methods and means of the activities of the members.

[fol. 811] Q. Now, Mr. Hild, don't you know that the revised Section 29 of Article X as set out in the 1944 edition of your Official Journal of 1944 edition of your By-Laws was not even intended to become effective until September 15, 1944; don't you know that?

A. No, I don't know that.

Q. If your secretary of your Federation of Musicians in the performance of his official duty said there was, you would still make that claim?

A. If he said there was I would be inclined to question his statement.

Q. He has said there was. You know there is a By-Law which requires the secretary to publish every change of any kind of the By-Laws not later than July following the mak-

ing of the change, in the International Musician, do you not?

A. A change as made at convention or made during the year?

Q. Any change?

A. No, I am not familiar with any such a law.

Q. I hand you what the reporter has marked plaintiffs' Exhibit B-38, and ask you to turn to page 12 of that Official Publication in the right-hand column a little below the center of the page: Do you find printed there the words "New Laws And Changes"?

[fol. 812] A. That is correct.

Q. I think you said you probably used the word laws as meaning by-laws?

A. That is right.

Q. Immediately under that heading do you find a heavy print, black faced paragraph?

A. I do.

Q. Will you read that paragraph for the record?

A. "The following are important new laws and changes in the By-Laws of the American Federation of Musicians, adopted and ratified by the 1944 Convention. They will become effective September 15, 1944, and all members are directed to govern themselves accordingly."

Q. At the bottom of the page in the column, the heading of which you have read appears the word "Continued on page Fourteen", or the words, is that correct?

A. That is correct.

Q. Now turning to page 14, do you find at the middle of the page "New Laws and Changes, (Continued from page 12)"?

A. Yes.

Q. And in the following column, following that heading, do you find on that page 14 a sub-heading entitled, "A New Law Designating Through Whom Members May Accept Engagements"?

[fol. 813] A. Yes, I do.

Q. And what appears under that heading on that sheet of your Official record?

A. "Members of the American Federation of Musicians are permitted to solicit, negotiate or accept engagement to

play in bands or orchestras Only from employers who engage or employ them through a leader, another member, or other persons, who for this purpose shall be considered the agent or agents of such employer. Provided that members may contract personally with a symphony orchestra management."

Q. That is the same material you observed in the 1944 revised copy of the By-Laws, is it not?

A. I would say in fact.

Q. Is your secretary considered efficient?

A. Yes.

Q. When your efficient secretary prepared the 1941 revision of your By-Laws he inserted the Form B contract verbatim, didn't he, as a part of the revised By-Law?

A. Yes.

Q. Your convention took action for the purpose of making that insertion, did they not?

A. They did.

Q. That single action providing for the insertion of that [fol. 814] By-Law was the only action pertaining to Form B contract taken by the 1941 Convention, wasn't it?

A. Repeat that question. The single action regarding Form B contract?

(Question read by the reporter.)

A. What By-Law?

Q. Article XVI of your By-Laws?

A. I am not sure of that, no. I don't know.

Q. You don't know of any other action, do you?

A. No, nor do I know that they were so taken in 1940.

Q. When was the Form B contract devised?

A. 1941.

Q. It is set out verbatim in the 1941 By-Laws?

A. It is.

Q. When was the action revising your By-Laws to insert it taken then?

A. I think it was taken some time after 1941, or at least was not referred to in the 1941 Convention.

Q. Referring to Article XVI of your By-Laws, Mr. Hild, the one which sets out verbatim a copy of that Form B contract—

A. The copy Form B contract was certainly adopted in 1941.

Q. And it was placed in your Revised 1941 By-Laws?

A. Yes.

[fol. 815] Q. As your forward edition of 1941 By-Laws was published? A. Yes.

The Court: I guess we will quit at this point and take a recess until two o'clock.

12:00 noon, court adjourned until 2:00 p. m. today.

Afternoon Session, December 13, 1944,

2:00 O'Clock.

Oscar F. Hild, being recalled, and on further cross-examination by Mr. Clyde B. Charlton, testified as follows:

Q. Mr. Hild, plaintiffs' B-39, which I now hand you is a copy of the Official Printed Constitution, By-Laws and Standing Resolutions of the American Federation of Musicians of the United States and Canada for the year 1940, is that correct?

A. That is correct.

Mr. Charlton: The plaintiffs now offer in evidence plaintiffs' Exhibit B-39.

Mr. Padway: No objection.

Mr. Cohen: No objection.

The Court: It will be admitted.

[fol. 816] Plaintiffs' Exhibit B-39.

Filed in U. S. District Court, December 13, 1944.

Constitution,

By-Laws and Standing Resolutions

of the

American Federation of Musicians

of the

United States and Canada

Held at Indianapolis, Ind., June 10-15. As Amended and Adopted at the Forty-fifth Annual Convention,

1940

* * * * * *

By-Laws.

Article I.—Duties of Officers and Organizers.

Section 1. Duties of President. It shall be the duty of the President to preside at all meetings of the Federation and Executive Board; sign all documents of an official character pertaining to the Federation; sign all vouchers; appoint all committees unless otherwise ordered. It shall be his duty and prerogative to exercise supervision over the affairs of the Federation; to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members and/or Locals; any such order may by its terms (a) enforce the Constitution, By-Laws, Standing Resolutions, or other laws, resolutions or rules of the Federation, or (b) may annul and set aside same or any portion thereof, except such which treat with the finances of the organization and substitute therefor other and different provisions of his own making; the power so to do is hereby made absolute in the President when, in his opinion, such orders are necessary to conserve and safeguard the interests of the Federation, the Locals and/or members; and the said power shall in like manner extend to and include cases where existing laws are inadequate or provide no method of dealing with a situation. He shall call special sessions of the Executive Board when necessary; call strikes; draw upon the funds of the Federation to pay the salaries of traveling members accompanying a theatrical organization when called on to strike while on the road, and for the payment, if necessary, of hotel and traveling expenses of other members who are called on strike by him during any emergency when outside of their own jurisdiction and play engagement for which no tax is collected by the Federation, and for which otherwise no strike benefits are paid; draw funds in payment of all expenses occasioned by the exercise of his duties; perform such other duties as may elsewhere be provided for in the Constitution, By-Laws and Standing Resolutions of the Federation; have the casting vote of a tie, and at the end of his term of office he shall report his acts and doings to the Annual Convention of the Federation, and upon convening of the Convention he shall appoint the

following committees, viz.: First, Credentials; second, Finance; third, Laws and Supervisions; fourth, Measures for the benefit of the Federation, and such other committees as may be voted for by the Convention.

* * * * * *

Sec. 3. Duties of the Secretary. The Secretary shall keep a faithful record of the proceedings of all meetings; answer all communications appertaining to the Federation; issue all charters upon receipt of a certified list of applicants for membership; inform all locals of all additions to the Federation, as well as all properly presented claims for default of services rendered by members; notify the delegates of all meetings; issue monthly statements of erased, suspended, expelled and transferred members in tabulatd form; attest all bills and orders; cause the minutes of each convention to be printed in full and distributed to the Locals not later than thirty days after adjournment; publish not later than the July issue of the International Musician, all laws that have been amended, added to, or in any way changed; he shall send to each Local Secretary every six months a copy of the galley list of the Local for inspection; he shall in his annual report, under the heading of "List of Locals," designate the jurisdiction of every Local as recognized by the A. F. of M.; he shall add to the list of Locals the name of each Local as it is known in its jurisdiction; procure and preserve the necessary books, papers and other documents appertaining to his office, and transmit them to his successor when properly qualified to receive the same, clear of all incumbrance. And for the faithful performance of his duties he shall receive a salary of ten thousand dollars ($10,000.00) per annum, payable semi-monthly; he shall be authorized to employ stenographers, typists and such other clerical assistance as may be necessary, at his own discretion; he shall notify all Presidents of Locals to incorporate an order of business through which members will be instructed to patronize none but union men and purchase only such goods as bear the union label.

* * * * * *

Article IX—Rights and Duties of Locals.

* * * * * * *

Sec. 24. Locals have a right to insist that Local leaders or contractors engage local members to fill miscellaneous engagements outside of the local jurisdiction.

* * * * * *

Sec. 27. A Local has the right to prevent a member from colonizing musicians in its jurisdiction. A leader, manager or agent (member of the Local) must obtain the consent of his Local before engaging musicians from outside for permanent or single engagements. But a member so imported shall not be required to deposit a transfer card unless the engagement extends over four weeks. Such member must not fulfill any other engagement until his transfer card has been deposited unless permission is granted by the Local.

* * * * * *

Article X—Rights and Duties of Members.

* * * * * * *

Sec. 13. Leaders, contracting members or other members of a Local who demand, request, induce or try to induce other members not to play with or for any leader or contracting member, or with or for any other member or members, shall be fined not less than $25.00 nor more than $100.00, or be suspended or expelled from membership by the Local with which they are affiliated.

* * * * * *

Sec. 20. Traveling members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M.

Penalty: Fine of not less than $100.00.

* * * * * *

Sec. 23. A contracting member who assumes the responsibility for the payment of a member's services is bound by his action, and cannot escape his obligation by claiming the protection of any Local or A. F. of M. law.

Sec. 24. A Leaders of orchestras or bands playing season engagements on boats plying between different ports may engage members from any Local. Where Locals are maintained in such ports the highest price in existence among them governing such work shall prevail. However, if the International Executive Board deems the price maintained by any one Local contrary to the interests of any other Local equally interested, then the International Executive Board shall assume jurisdiction over the engagement and name a price equally binding upon all Locals and members.

Sec. 29. Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished, provided that in states or provinces where laws exist, which prescribe a different method of contracting, or where the provisions of law are such that to contract as above prescribed would be contrary to the interests of members, Locals are authorized to establish such method of contracting as may best conserve the interest to members. However, members may accept engagements from traveling theatre company managements direct, provided their contract, in addition to the signatures of the contracting parties, is countersigned by the musical director of the company or the member of the Federation who engages the members for the company. Furthermore, members may contract with symphony orchestra management direct in conformity with all Local and Federation laws.

If a member violates the above, such action shall constitute his resignation from membership in such Locals where he held membership, and in the American Federation of Musicians.

Sec. 39. A member of the Federation cannot accept an engagement to join a traveling band or orchestra from a non-member, neither can he negotiate with a non-member for such an engagement.

A member shall be deemed guilty under the provisions of this law if he negotiates for such an engagement as named in the law with a non-member, even though he subsequently signs a contract for the same engagement with a member of the Federation.

A fine of $100.00 shall be imposed upon a member who violates this law, and if failing to obey the instructions of a Local or an officer of the Federation to forthwith surrender such engagement it shall be considered equivalent to his resignation from all Locals wherein he hold membership, and in the American Federation of Musicians, and all Locals and members of the Federation must therefore consider him a non-member.

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Sec. 45. Any member, leader or contractor employing members of the A. F. of M. on any traveling, location or out-of-town engagement shall employ only such members who are in good standing in their respective Locals and carry their Local Union Cards paid up to date. For any violations of this section he shall be subject to a fine of not less than $10.00, nor more than $50.00 for each and every violation.

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Sec. 48. Members of the American Federation of Musicians who accept engaggements for bands or orchestras must in person sign their contracts for same or give some agent power of attorney to sign their names. They are responsible for the fulfilling of the contracts under union conditions, and ignorance of the terms of any contract signed by an agent shall not be valid excuse. The contract must be submitted to the Local Union for inspection in accordance with the rules of the Federation. All collections for the engagement must be made by the member who furnishes the orchestra and not by the agent. Members of the orchestra must be paid by the contracting member or leader of the band or orchestra and not by the agent. All agents who go into collusion with members to defeat the object of this or any other law of the American Federation of Musicians shall be held as unfair to it by the Federation and thereafter members cannot accept engagements from or through them.

The price of an engagement must cover the services rendered by musicians, and nothing else. If an orchestra carries added attractions, such as singers, etc., the contract must show an additional charge to cover their services. Leaders, their agents or contracting members, are prohibited from furnishing singers free of charge on any and all engagements.

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Sec. 18. * * * * *

Traveling members other than leaders must sign contracts with contractors, members of the A. F. of M.

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Article XIII.

Traveling Orchestras And Members.

Traveling Cards And Tax.

Members Playing Out-Of-Town Engagements.

* * * * * *

Sec. 10 * * * * * *

C. A contractor or leader, as the case may be, in every case before an engagement is played, must submit his contract for same to the Local Union in whose jurisdiction same is played, or in the absence of a written contract file a written statement with such Local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hour of the engagement, as well as the names of the members who will play same and the Locals to which they belong and the minimum

amount of money paid each individual sideman, based on the minimum Local scale.

* * * * * * *

I. In the selecting of the members of the orchestra, the leader or manager of same need not confine himself to the membership of the Local in whose jurisdiction the orchestra is organized.

* * * * * * *

K. All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two weeks' notice to the other.

L. * * * * * *

A member cannot form a traveling dance orchestra in the jurisdiction of the Local to which he belongs, and make such jurisdiction the headquarters of the orchestra, and compete for and fill local engagements with same.

M. * * * * *

Note—In all else the Constitution, By-Laws and Standing Resolutions of the A. F. of M. shall apply to the members of a traveling orchestra.

* * * * * *

Article XVII—Miscellaneous.

Section 1. Performers on musical instruments of any kind who render musical services for pay are classed as professional musicians and are eligible for membership, subject to the laws of and jurisdiction of the A. F. of M.

* * * * * *

[fol. 817] Mr. Charlton: The plaintiffs offer in evidence plaintiffs' Exhibit B-38, being the July 1944 issue of the International Musician, with particular reference to pages 12 and 14 referred to in the witness' testimony.

Mr. Padway: No objection.

Mr. Cohen: No objection.

The Court: It will be admitted so far as the pages particularly referred to are concerned, and the date of the publication.

Plaintiffs' Exhibit B-38.
Filed in U. S. District Court December 13, 1944.

International Musician

Entered at the Post Office at Newark, N. J., as Second Class Matter. Accepted for mailing at special rate of postage provided for in Section 1103, Act of October 3, 1917, authorized July 10, 1918."

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HONORARY PRESIDENT AND GENERAL ADVISOR
JOSEPH N. WEBER, 621 Alta Drive, Beverly Hills, California

EXECUTIVE COMMITTEE
CHAUNCEY A. WEAVER..325 Insurance Exchange, Des Moines 9, Iowa
OSCAR F. HILD.....206 Atlas Bank Building, Cincinnati 2, Ohio
J. W. PARKS.....416 Southland Building, Dallas 1, Texas
HERMAN D. KENIN...Room 645, Pacific Building, Portland 4, Oregon
WALTER M. MURDOCH..22 Royal York Rd. North, Toronto, Ont., Can.

Nothing is politically right which is morally wrong.—DANIEL O'CONNELL.

Instead of having the desired effect these distortions only served to solidify our Federation. We have always been a unified organization and can boast that our members were never more loyal than during the past two years. Knowing the truth they stand foursquare behind our President in the realization that he is carrying out the wishes of the rank and file of the membership.

If any evidence were needed that musicians have full confidence in their officers it was furnished by their re-election at our Convention, in Chicago a few weeks ago. (Incidentally—and this came as a surprise to Senator Clark*, father of the Senate Investigation into the affairs of the Federation, who learned of it first during the hearing before the Senate Sub-Committee—our by-laws provide for nomination for office from the floor of the Convention, instead of by an intervening nomination committee, which is the method used in many organizations to control elections by a small group.) Further proof of confidence of members was provided by the following resolutions which were spontaneously introduced and unanimously adopted:

RESOLUTION No. 43.

(This resolution directs that no members play for recordings except in conformity with the existing contracts. It is a mandate to the President and the Executive Board to continue in the same manner as heretofore, and ratification of everything that has been done in the recording situation.)

WHEREAS, The Convention of the American Federation of Musicians, held at Seattle, Washington, in June, 1941, instructed the officers of the Federation to take appropriate action to abolish the evil of unemployment created by the use of mechanized music; and,

WHEREAS, President Petrillo of the Federation reported to the Convention of the Federation at Dallas, Texas, in June, 1942, that the Executive Board was prepared to take action in the matter by terminating all licenses for all musical services in connection with the making and manufacture of recordings and transcriptions, and

WHEREAS, The American Federation of Musicians did on June 21, 1942, send written notice to all persons engaged in manufacturing and making of records and transcriptions to the effect that after August 1, 1942, musicians would no longer work in the making and manufacturing of recordings and transcriptions which had the effect of displacing live musicians; and,

THEREFORE, BE IT RESOLVED, That we, the representative delegates to this Forty-eighth Convention, do hereby give our President a sincere vote of confidence. Be it further resolved, that we delegates concur in all former acts of our honored President. We herewith pray that the rich blessings of God Almighty be upon him, giving him strength, wisdom and understanding that he might continue the great work before him, that of raising the cultural values of the art of music, along with greater opportunities for economic advancement, and the perpetuation of our time-honored Federation.

(Signed): W. H. Bailey (710), Edward W. Bailey (767), Paul L. Howard (767), Fay E. Allen (767), Jack C. White (641), Robert J. Willis (548), Lloyd B. Gist (533), Lloyd V. Plummer (533), John F. Wood (473), Louis Jones (419), Charles S. Exum (242), R. L. Goodwin (550), William Shaw (627), S. S. Melendez (471), Velmer Mason (286), Bernard Mason (543), Edward A. Prettyman (543), Clemon E. Jackson (535), Artie Matthews (814), William Houston (496), J. E. Morton (637), P. S. Cook (462), Musco C. Buckner (208), Harry W. Gray (208), Wm. Everett Samuels (208), J. C. Douglas (675), Calvin A. Shields (632), Chas. Williamson (558), Jesse Hicks (185), Wm. H. Graham (623).

RESOLUTION No. 19.

(This resolution is also a pledge of confidence to our President, calling specific attention to the fact that his actions were the result of instructions of the Convention in Seattle in 1941.)

WHEREAS, We, the members of the Corpus Christi Musicians' Association, Local 644, A. F. of M., have received the written reports of President James C. Petrillo regarding the canned music fight, through the medium of the International Musician, and

WHEREAS, We have learned through the reports of the action he has taken to place before certain groups the right of our membership to be protected, and

WHEREAS, In his reports he has given the officers of the A. F. of M. full credit for their support in this fight, as well as the membership as a whole;

THEREFORE, BE IT RESOLVED, That at this National Convention of the American Federation of Musicians, the delegates present wholeheartedly endorse his reports, his actions, as per instructions of the Forty-sixth Annual Convention of the American Federation of Musicians in Seattle, Washington, and the results he has obtained, and

BE IT FURTHER RESOLVED, That the Convention here assembled give our President a rising vote of thanks and confidence at the time this resolution is adopted.

Convention Gives Unqualified Approval

AFTER the recording ban went into effect on August 1st, 1942, the country was flooded with newspaper articles, editorials and cartoons, all part of an organized campaign of vilification and scurrility against President Petrillo and the Executive Board. The large majority of the attacks were aimed at President Petrillo, making him appear as a dictator who had forced the Federation to do his bidding, notwithstanding the fact that the ban was the result of the insistent demand of our entire membership for relief from the competitive use of recordings by many persons who employed no live musicians yet got the benefit of their services.

In spite of all the attacks, which in the main consisted of prejudiced untruths, the President and Executive Board stood firm in carrying out the mandates of numerous conventions and fought our enemies through the courts, up to the Supreme Court of the United States, which tribunal upheld our position. Then the interests, some of whom never employed a live musician, forced the matter before a sub-committee of the United States Senate and also before the War Labor Board, which latter body has just handed down a decision apparently not in our favor, but which in reality decides nothing.

The hearings before the panel of the War Labor Board developed the interesting fact that the National Association of Broadcasters, generally known as N. A. B. (the majority of whose members employ no musicians in their radio stations), which was not even a party to the proceedings and therefore had no official standing in the case, paid for all the expensive exhibits introduced in evidence in the case by the transcription companies. These consisted of charts and graphs made up of statistics gathered by N. A. B., and it was admitted that N. A. B. had financed the proceedings on behalf of the companies.

It is to be noted that, whereas more than eighty companies who have signed our contracts admit a responsibility for the plight of the musician whose employment is reduced due to mechanical competition and are willing to assist in its alleviation, two recalcitrant companies, though they admit there is such a problem, with callous indifference declare it "none of their business".

Attempts were made to bring discord into our ranks by stories that our President was not acting in the best interests of the members and that our by-laws gave him dictatorial powers, with the intimation that these laws were passed at his instigation, whereas it is well known that they existed long before he became President.

The old game of waving the flag was also indulged in by our enemies. We were supposed to be unpatriotic notwithstanding the facts that nearly one-third of our entire membership is in the armed services, that we have contributed millions of dollars in services for the armed forces and are continuing to do so and that the ban did not hinder the war effort in the least. We continued to make records for the use of the men in service and have many letters from governmental agencies attesting their appreciation of our help.

and the effect of displacing live musicians; and,

WHEREAS, On August 1, 1942, all employment of that character terminated, and no demands were made upon employers, and the same was a complete severance and termination of the employment relationship; and,

WHEREAS, Subsequently, some of the former employers did agree to employ members of the American Federation of Musicians in the making of transcriptions and records upon terms and conditions embodied in certain agreements, one of which is known as the "Decca" agreement, and another is known as the "Four Employer Contract", and the making of said agreements being instigated by Government agencies, and

WHEREAS, Other companies are desirous of employing members of the American Federation of Musicians in the making and manufacturing of records,

NOW, THEREFORE, BE IT RESOLVED, That no member or members of the American Federation of Musicians shall take employment or become employed in the making and manufacturing of records and transcriptions upon terms and conditions different from those prescribed in the "Decca" contract or in the "Four Employer Contract"; and the officers of the American Federation of Musicians hereby stand instructed to refrain from entering into any contracts or agreements with any person, company, or employer who seeks the services of any musicians in the making of records and transcriptions unless such person, company or employer enters into a written agreement with the Federation embodying the same terms and conditions now included in the "Decca" contract and the "Four Employer Contract", and

BE IT FURTHER RESOLVED, That the Convention now in session hereby ratifies and confirms all acts of the officers and the Executive Board of the Federation heretofore taken on the subject referred to in this resolution.

J. K. WALLACE (47).

RESOLUTION OF APPRECIATION

(This resolution was introduced and sponsored by all the colored delegates to the Convention and is further evidence of the unanimity of opinion among the members.)

WHEREAS, In the past two years our honored President, James C. Petrillo, has done everything possible to carry out the mandates of the National Conventions of the A. F. of M., and

WHEREAS, In the course of his activity as President, he has ever been militant in fighting for the common interests of all members of the Federation, regardless of race, creed, color or national origin, and

WHEREAS, In the interest of good faith and fair dealing, we the undersigned, here and now resolve to let the people of our nation know of our feeling toward President James C. Petrillo, our honored Chief Executive, and

WHEREAS, Because of the most unfavorable publicity he has received at the hands of the enemies of organized labor, as well as the press and syndicated newspapers and periodicals, who have sought along with many others, high in the government of our country, to discredit his acts, with the hope of gaining public favor—further to attempt to destroy the high morale of the members of our organization:—

claims and confidence at the time [illegible] adopted.

WILLIAM CLITHEROE (644)
TERRY FERRELL (644)

This should be sufficient answer to those who have been defaming our President. It should prove conclusively that the recording ban is an expression of the will of our entire membership and that the manner in which it has been conducted has its whole-hearted approval.

Public sentiment which was swayed by the misrepresentations of a biased and unfriendly press is turning in our favor, as the truth forces its way into the open. The knowledge that we are right strengthens our purpose to continue the fight until we achieve our goal.

New Laws and Changes

The following are important New Laws and changes in the By-Laws of the American Federation of Musicians, adopted and ratified by the 1944 Convention. They will become effective September 15th, 1944, and all members are directed to govern themselves accordingly.

Conditional Membership Abolished

Due to neutral jurisdictions being eliminated the granting of Conditional Membership has been abolished.

Correction in Transfer Law

Change the words "one week" on line 3 of paragraph 2 of Section 10, Article XII, page 113, to read "two weeks". This corrects the verbiage and makes it consistent with the law.

National Secretary to Notify Locals When Claims Are Filed Against Establishments in Their Jurisdictions

In all instances where claims are entered by out-of-town musicians against establishments in which they have played, the National Secretary's Office shall immediately notify the local of that fact.

Simplifying the Laws of the Federation

The Executive Board has been instructed to codify and simplify the laws and index at the earliest opportunity.

Leaders and Agents Must Notify Local Where They May Be Located

On arrival in the jurisdiction of a local where an engagement is to be played, the leader or his agent must advise the local secretary of the place where the leader and agent may be located.

Changes by President to Be Published

Whenever the President under his powers in an emergency promulgates an amendment to the Constitution or By-Laws such change shall be printed in the first issue of the *International Musician* after the effective date of promulgation.

(Continued on Page Fourteen)

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* While the investigation was supposed to be impartial, Senator Clark assumed the role of prosecutor of President Petrillo. Also strange was the fact that, while the witnesses for the Federation were put under oath, the witnesses against it were not required to conform to this formality. Of such strange things are "Senatorial Investigations made. Senator D. Worth Clark, we might add, was recently defeated for renomination.

Plaintiffs' Exhibit B-38.
Filed in U. S. District Court December 13, 1944.

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dent, J. Wharton Gootee of Chester; First Vice-President, Clair E. Meeder of Pittsburgh; Second Vice-President, William S. Mason of Uniontown; Third Vice-President, George W. Snyder of Reading; Secretary, George H. Wilkins of Pittsburgh; Treasurer, O. Oscar Dell of Hanover.

One of the musical delights of the Convention period was the pipe organ playing of Mr. F. LeRoy Nelson, a Chicago native son, and member of Local 10 since 1919. His repertoire was as amplitudinous and variegated as the world-wide range of musical composition. Classical, modernistic, and the unusual responded to his touch with equal felicity; and the two daily programs both had large crowds of attentive and appreciative listeners.

It was a pleasure to have A. R. Teta appear upon a national Convention scene once more. For an extended period he has functioned as Chief Supervisor and Inspector of Band Instruments Section, at Atlanta, Georgia. He has relinquished that position to become secretary-treasurer of the United States Army and Navy Bandmen's Association, Inc., where he can be reached through P. O. Box 1826, New Haven, Connecticut. To meet him again was to span once more past years through which he has come apparently hale and hearty and zealous in the cause in which he has been so long engaged.

Many delegates propounded the query, "Where will we go from here?"

To appreciate how Chicago has grown, one should read a description of the city at the time Abraham Lincoln was first nominated for the Presidency in the Wigwam, which had been erected for that historic event, in 1860.

Anyone carrying the patronymical embellishment of Désiré DeFauw must be endowed with a high-grade of genius. The one we have in mind is surely in that class. We refer to the new conductor of the Chicago Symphony Orchestra. This great organization had its foundations laid under the leadership of Theodore Thomas. When Thomas passed away, the viola player in the orchestra, "to fortune and to fame unknown", was called to the position thus vacated. As usual there

NEW LAWS AND CHANGES

(Continued from Page Twelve)

Charter to Lapse When Local Membership Becomes Less Than Fifteen

When the membership of any local becomes less than fifteen bona fide members in good standing the charter of such local shall automatically lapse and the members in good standing of such local shall have the right to join the nearest local without payment of initiation fee.

Leader to Be Permitted to Cancel Management Contract If Average Earnings Are Not Maintained

Compliance with the twenty weeks within six months work provision required by Federation contracts shall be deemed fulfilled by booking agents only if the latter shall have offered the artist twenty weeks engagements within each six months period at a scale in reasonable conformity with the average earnings of the artist during the preceding six months period.

New Opera Scale Where Price of Choicest Seat Does Not Exceed $4.00 and Also Where It Does Not Exceed $3.00

Section 5 of Article XIII is changed from ". . . each week, per man, $100.00" to read ". . . each week, per man, $115.00".

Section 6 of Article XIII is changed from ". . . does not exceed $2.00, . . . each week, per man, $85.00" to read ". . . does not exceed $3.00, . . . each week, per man, $100.00."

A new Section 7 is added providing "Where the price of the choicest seat (exclusive of box seats) does not exceed $2.00, for not more than seven performances each week, per man, $90.00."

To the third line on page 137 add "Section 7, pro rata".

person, company, or employer who seeks the services of any musicians in the making of records and transcriptions unless such person, company or employer enters into a written agreement with the Federation embodying the same terms and conditions now included in the "Decca" contract and the "Four Employer Contract".

The Convention now in session hereby ratifies and confirms all acts of the officers and the Executive Board of the Federation heretofore taken on the subject referred to in this resolution.

A New Law Designating Through Whom Members May Accept Engagements

Members of the American Federation of Musicians are permitted to solicit, negotiate or accept engagement to play in bands or orchestras ONLY from employers who engage or employ them through a leader, another member, or other persons, who for this purpose shall be considered the agent or agents of such employer. Provided that members may contract personally with a symphony orchestra management.

If a member violates this section the violation shall constitute and be considered as his resignation from the American Federation of Musicians and the local or locals in which he holds membership.

Taverns and Inland River Boats Added to Traveling Engagements Under Article XIII

Taverns and inland river boats are added to the type of engagements which are considered traveling engagements and should be added to the word "inns" on lines 11 and 20 on page 121, Article XIII.

Traveling Members Must Be in Possession of a Membership Card or Receipt

Article XIII formerly provided that trav-

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great organization had its foundations laid under the leadership of Theodore Thomas. When Thomas passed away, the viola player in the orchestra, "to fortune and to fame unknown", was called to the position thus vacated. As usual there were lifted eyebrows of apprehension, whisperings of suspicious dissent, and clamorous tongues opining that the young Frederick Stock would never do. Well, he did do for something like a third of a century; and brought this notable company of instrumentalists to a world-wide fame. Stock's hour of translation came and the new conductor, above named, assumed the baton of leadership. Some of Chicago's tinsel-winged newspaper critics are filling their allotted space with the barbed-wire tips of their high and lofty animadversions. We venture to say that the one and one-half hour concert given by the Chicago Symphony Orchestra on the opening day of the recent Convention, was looked upon by delegates and visitors as a great event, an enriching experience, and that the new man at the helm made a profound and lasting impression. All hail to Désiré DeFauw!

Color is not a handicap to Marian Anderson. Modestly and with calm poise her very soul seems to lift upward on the wings of song. It is no exaggeration to say that she held her convention audience spellbound. Her recalls were numerous. She was generous in response. Long may she live to make her inspiring contributions of melody to all races of the world.

Local 10 was determined to see to it that there was no lack of fine band and orchestra music. Think of crowding into a single week such an array of high-class musical organizations as the following:

Chicago Symphony Orchestra, Director, Désiré DeFauw.

Dyett's Concert Band, Leader, Captain Walter Dyett.

Women's Symphony Orchestra, Conductor, Jerzy Bojanowski.

Cavallo's Symphonic Band, Director, Peter A. Cavallo.

Board of Trade's American Legion Band, Leader, Colonel Armin F. Hand.

Red Saunders and his Band, Leader, Red Saunders.

With eminent propriety this might have been called "A week of musical saturation". Inspiring, glorious, memorable!

Too bad the blackguard and character-assassinating press could not have heard President Petrillo's address and the ovation accorded him on the opening Convention day. However, it is difficult to make impressions on empty skulls.

What thanks we owe to officers and men
For giving us a week we'll ne'er forget!
But language fails us—much to our regret!
Our hats are off to Local No. 10!

clusive of box seats) does not exceed $2.00, for not more than seven performances each week, per man, $90.00."

To the third line on page 137 add "Section 7, pro rata".

Change the seventh line on page 137 which now reads "Sections 5 and 6—$2.00 per hour or less" to read "Sections 5, 6 and 7—$2.00 per hour or less".

Change line 21 on page 137 which now reads: "Sections 5 and 6—not less than $66.00 for one or two rehearsals per day" to read "Sections 5, 6 and 7—not less than $66.00 for one or two rehearsals per day".

Contracts of Employment Must Contain the Following New Clauses:

"Any member or members who are parties to or affected by this contract, whose services thereunder or covered thereby, are prevented, suspended or stopped by reason of any strike, ban, unfair list order or requirement of the Federation shall be free to accept and engage in other employment of the same or similar character, or otherwise, for other employers or persons without any restraint, hindrance, penalty, obligation or liability whatever, any other provisions of this contract to the contrary notwithstanding."

'All contracts of any character or nature for the rendition of musical services are subject to all the existing and future provisions of the Federation's Constitution, By-Laws, Rules and Regulations, and all amendments thereto, all of which are made part hereof, with the same force and effect as if they were incorporated herein in full, and in the event of any inconsistency or conflict the provisions of such Constitution, By-Laws, Rules and Regulations shall control."

Members Are Not Permitted to Take Employment for Recordings Under Conditions Different From Those Prescribed by Present Federation Recording Contracts

No member or members of the American Federation of Musicians shall take employment or become employed in the making and manufacturing of records and transcriptions upon terms and conditions different from those prescribed in the "Decca" contract or in the "Four Employer Contract"; and the officers of the American Federation of Musicians hereby stand instructed to refrain from entering into any contracts or agreements with any

Traveling Members Must Be in Possession of a Membership Card or Receipt

Article XIII formerly provided that traveling members produce a paid-up card. The law has now been changed so that members must on demand produce either a membership card or a receipt showing current quarter paid in local or locals in which they hold membership.

Fifth War Loan

Two resolutions were introduced having to do with the purchase of War Bonds. A substitute for these resolutions recommended by the committee and passed by the Convention urged and recommended that the American Federation of Musicians and all of its locals and members purchase War Bonds to the fullest extent of their ability to pay.

Locals to Receive Share of Radio Tax

Article X, Section D, Paragraph 2, is amended to provide that 20 per cent of the radio tax collected thereunder is to be returned to the local and 80 per cent to be retained by the Federation.

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[fol. 819] Q. Now, Mr. Hild, in the course of your discussion at the Miami session in 1941, did anyone state that any ballroom owner had appeared or attended sessions between Mr. Petrillo and the Treasury Department which were had in Washington during the prior sessions?

A. No.

Q. You did not understand that any representative of the ballroom owners was there? A. I did not.

Q. Nor that any representative of the movie industry was there? A. I did not.

[fol. 820] Q. Or the radio industry? A. No.

Q. Or anybody in the entertainment world other than Mr. Petrillo and the Union's lawyer, is that correct?

A. I understood that no one was there except them.

Q. Mr. Hild, have you been in Iowa before?

A. Oh, yes.

Q. Did you ever have occasion to call on Mr. Geer?

A. No.

Q. Or Mr. Bartels? A. No.

Q. Never seen their places of business? A. No, sir.

Q. Never saw any of the ballrooms where at performances involved in this case were had? A. No, I did not.

Q. Never met those gentlemen prior to today?

A. Never.

Q. You are not generally acquainted with the musicians, the rank and file of musicians in this territory, are you?

A. A few.

Q. You know Mr. Weaver, of course?

A. That is true.

Q. And perhaps the president of the Local Union here?

[fol. 821] A. That is true.

Q. Can you give the name of any other members of the Local Union other than the president?

A. Here?

Q. Yes.

A. No. I know the orchestra leader at one place here.

Q. You cannot name the president of the Local Union at Fort Dodge, Spencer, or Dubuque?

A. No, not offhand.

Q. You had a brief career as a sideman on a band?

A. I had a brief career as a sideman and a brief career as a leader, very brief.

Q. That was quite a good many years ago? A. Ye

Q. When did you last have employment as a sideman in an orchestra? A. 1929 or '30.

Q. Fourteen or fifteen years ago?

A. That is correct.

Q. And was that about the time when you had your last engagement as a leader?

A. No, that occurred much prior to that, 1923, '24 or '22, or thereabouts.

Q. You are not personally acquainted with any of the men who appeared as witnesses in this case yesterday? [fol. 822] A. No, I am not.

Q. Any of the day before? A. I am not.

Q. You do not know any of the band leaders who have been mentioned in the testimony in this case?

A. Not only by reputation, by virtue of my position.

Q. Not personally? A. No.

Q. You could not name personally any of the sidemen on any of those bands, could you?

A. No, I could not.

Q. Do not recall having any conversation with either the leaders or sidemen of any of those bands prior to now, do you? A. No.

Q. Of course you never played on any of those bands?

A. I did not.

Q. By band, you understand it referred to orchestras; the terms are used interchangeably, are they not?

A. Yes.

Q. You do not know, as of your own personal knowledge, anything concerning the method of performing adopted by these bands, by observation or from conversation with the members or leaders?

[fol. 823] A. From either of those sources, no.

Q. Of course you were not in attendance at any of the performances involved in this case? A. No, I was not.

Q. Had nothing to do with any of the engagements leading up to those performances? A. No, I did not.

Q. And do not know what was done at the performances? A. No.

Q. Don't know anything that was done in connection with the booking of them, do you? A. No, I don't.

Q. Now the statement that you made as to what you believed the members of the Union were required, or not

required to do, was your opinions of the meanings of the By-Laws and Constitution only, were they not?

A. That is correct.

Q. And you cannot recite verbatim any single By-Law of the Union, can you?

A. I might be able to pick up one that I might recite verbatim.

Q. You do not understand that the Union is a party in this case, do you?

A. A party in the case directly, no; an interested party, [fol. 824] yes.

Q. You are interested as a spectator? A. I am.

Q. You are not a party?

A. I would not deem myself such.

Q. You know, of course, the American Federation of Musicians is not a party to the case?

A. I assume under legal language that is true, yes.

Q. The Union does not appear as a contracting party, you understand that, on any of the Form B contracts referred to in evidence? A. I understand that.

Mr. Charlton: At this time, Your Honor, the plaintiffs move to strike all of the testimony of the witness Oscar Hild purporting to state the terms of any formal action taken by the International Executive Board of the American Federation of Musicians with reference to instructions or directions given by that Board to Petrillo, for the reason that it affirmatively appears that the witness' testimony is not the best evidence, it now appearing affirmatively in the record that such action was recorded and evidenced by a writing officially made, recorded and in existence.

The Court: Why, I think that should be overruled. How- [fol. 825] ever, I will make a ruling on it later.

Mr. Charlton: Now, Your Honor, further the plaintiffs move to strike all the testimony of the witness Oscar Hild purporting to state the terms of any formal action taken or describing or setting forth the effect of any formal action taken by the International Executive Board of the American Federation of Musicians with reference to instructions or directions given by that Board to James C. Petrillo, and for the same reasons stated in the previous motion.

This motion, Your Honor, intends to go further and strike the testimony of the witness as to the effect of such formal action to the extent that he so tesified.

The Court: It would not go any further than that. You are limited to that part of his testimony which tended to give his opinion as to the effect?

Mr. Charlton: Yes.

The Court: Well, I have already indicated what I think about it, but I will let it stand to be ruled on later. (Complainants except.)

Mr. Charlton: Now, if the court please, the plaintiffs move to strike all of the testimony of the witness Oscar Hild purporting to state the terms of any order of James C. Petrillo made at any time prior to the dates of the en-[fol. 826] gagement involved in this case, purporting to deal with the subject matter of revision or changes in By-Laws of the American Federation of Musicians, for the reason that the testimony of the witness is not the best evidence, constitutes the opinion and conclusion of the witness, and for the reason that it now appears in the record affirmatively that such action was recorded and evidenced by a writing officially made and in existence at this time.

The Court: Well, as to that I think oral evidence is admissible. Of course where it is taken and there is a writing in the hands of the other party it casts a great doubt upon its correctness. But, I understand, if I remember the rule, you can testify to what happened in a meeting, for what it is worth.

Mr. Charlton: I call your attention to the fact that my motion is narrower than conversation or other events of the meeting.

The Court: I will reserve a ruling on that at least until after the close of the direct examination.

Mr. Charlton: I think that is all of the cross-examination, Your Honor.

The Court: Any redirect examination?

[fol. 827] Redirect Examination.

By Mr. Joseph A. Padway:

Q. You were asked, Mr. Hild, this morning by Mr. Charlton whether there was any minutes of meetings. I

have here the convention proceedings 1941, Seattle, Washington, June 9-14, 1941, I refer now to the page which is entitled "Minutes of the International Executive Board, Palmer House, Chicago, Illinois, December 5, 1940," contained in exhibit 8 of the proceedings, and without reading it unless the court and counsel wants me to, I call your attention to the fact that a special meeting was called by President Petrillo to report to the Executive Board the result of his conferences with the attorney of the U. S. Treasury Department in Washington with reference to the responsibility of members of the Association with reference to the Social Security Act. President Petrillo explained the present statutes and the situation became so great that it became necessary to have a special meeting of the Executive Board for the purpose of trying to find some definite purpose which will enable our members and leaders to know their exact position. Now that became a general discussion, did it not?

A. There must have been, yes.

Q. Well, were you present at that meeting?

[fol. 828] A. Yes, I was present.

Q. Do you recall the general discussion of this matter?

A. I recall many discussions of these matters, and I have assuming from the minutes it was on December 5th.

Q. That is the Chicago meeting, the last of the year?

A. Yes.

Q. In those discussions, not indicated here very definitely, was the matter of the policy respecting status discussed?

Mr. Charlton: Objected to as immaterial and irrelevant and not proper redirect examination, and calling for the opinion and conclusion of the witness, and not the best evidence.

The Court: Sustained. It is calling for his opinion as to whether the policy was discussed. (Intervener excepts.)

Q. No, policy of the status of—Well, I will withdraw it and put it this way: Was a discussion had by the Board respecting the relationship of the leader and sidemen to the establishment contracting with them?

Mr. Charlton: Is that a yes or no question?

Mr. Padway: Yes or no question.

A. Yes, sir.

Q. Was there anything there said respecting the vest-[fol. 829]-ing of control over the methods and means of service to be rendered by these bands discussed?

Mr. Charlton: Objected to as immaterial and irrelevant, and not proper redirect examination, and as hearsay, and as calling for conversations and events in no manner binding on the plaintiffs, and irrelevant.

The Court: Overruled. You may answer by yes or no. (Plaintiffs except.)

A. Yes.

Q. What was said there respecting it?

Mr. Charlton: Objected to as hearsay.

The Court: Sustained. (Intervener excepts.)

Q. Did that discussion and subsequent discussions at Miami on that subject culminate in the adoption of the Form B contract?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, immaterial and irrelevant.

The Court: Overruled. I think we ought to know about that. Answer, please. (Plaintiffs except.)

A. Yes.

Mr. Padway: No further examination.

Mr. Cohen: No questions.

Mr. Charlton: No questions. —Witness Excused—

[fol. 830] The Court: I will pass the ruling on the three motions made at the close of the testimony of the witness until after the testimony is closed.

[fol. 831] Paul Moorhead, recalled as a witness on behalf of the Intervener, testified as follows:

Direct Examination.

By Mr. Joseph A. Padway:

Q. Mr. Moorhead, you heard Mr. Bartels testify yesterday, didn't you? A. Yes, sir.

Q. You have been employed by him?

A. No, I beg your pardon. I did not.

Q. I beg your pardon, Mr. Geer.

A. That is right.

Q. You and your band have been employed by his establishment? A. Yes.

Q. And the contracts have been here in evidence, haven't they? A. That is right.

Q. As he testified himself, do you know to your knowledge, has he ever played music?

A. Yes. He used to have an orchestra, and used a saxophone.

Q. He had a pretty good one.

A. I never heard him.

Q. You mean you never heard a good saxophone?

A. I never heard Mr. Geer.

[fol. 832] Q. In working for Mr. Geer and his establishment the contract calls for your working at a specified time? A. Yes.

Q. And quit at a specified time? A. Yes.

Q. With intermissions taken? A. Yes, sir.

Q. Who designated the intermissions?

A. Mr. Geer.

Q. Mr. Geer asked you to diversify your music as to what to include, for instance, did he ever ask you to include waltzes of a certain kind he wanted you to play?

A. Yes, sir.

Q. What was his request of you respecting waltzes?

A. It was on the hour, every hour at Mr. Geer's establishment.

Q. That was the rule that he promulgated to you?

A. Yes, sir.

Q. Now then, did he have a loud speaker system?

A. Yes, sir.

Q. Did you have loud speaker systems?

A. Yes, sir.

Q. Did he use his loud speaker system?

A. Generally we used both of them.

Q. Now if he told you not to use yours and use only his [fol. 833] would you obey his direction?

Mr. Roberts: Objected to as a self-serving declaration, incompetent, irrelevant and immaterial.

The Court: Sustained. (Intervener excepts.)

Q. Did Mr. Geer ever give you an order, instruction or direction which you refused to obey?

Mr. Roberts: The same objection.

The Court: Overruled. (Plaintiffs except.)

A. No.

Q. What is the answer? A. I said no.

Q. Do you know whether he ever gave any instruction, direction or order to any of the sidemen which they refused to obey?

A. I don't think he had any dealings with the sidemen.

Q. Did you prohibit him from dealing with the sidemen?

A. No.

Q. Did you in any manner limit his right to give you orders respecting the method, manner or means of performance of your work, or the sidemen?

Mr. Roberts: Objected to as calling for an opinion and conclusion.

The Court: No, I think that part is all right. It is negative testimony, however. You may answer. Plaintiffs except.)

[fol. 834] A. What is the question?

Q. (Question read by the reporter.)

A. No.

Q. You are familiar with the Form B contract?

A. Yes, sir.

Q. Did you use the Form B. contract?

A. Yes, sir.

Q. What did you understand to be your duty toward Mr. Geer in the use of Form B contract, or under the Form B contract, respecting his right to give you orders as to the method, manner or means of performing the work?

Mr. Roberts: Objected to as immaterial and irrelevant.

The Court: Overruled. (Plaintiffs except.)

A. When we—let's start again. When we were working for Mr. Geer we respected him as the boss man, and what Mr. Geer wanted we did to the best of our ability, probably not so good.

Q. What he wanted you would do?

A. That is right, if we could.

Q. You held yourself then ready to obey his orders regarding the work and the performance of it?

A. That is right.

Q. Did you ever work for Mr. Bartels?

A. Yes, sir.

[fol. 835] Q. Did you have the same form of contract with Mr. Bartels? A. That is right.

Q. Is the same true with respect to Mr. Bartels that you held yourself ready to obey his instructions with respect to the manner, method and means of performance of the work? A. That is right.

Q. Did you ever refuse to obey an order or instruction of Mr. Bartels? A. No.

Q. Now there is something about copyrighting of music that enters into a performance of the character you rendered, is there not? That music is copyrighted, do you know that? A. I don't follow you.

Q. Would it be clear if I said to you copyrighted music can only be played with the permission of those who own the copyright? A. That is right legally.

Q. Who obtains the permit for the use of that copyrighted music, you, Mr. Bartels or Mr. Geer?

A. The purchaser of the music.

Q. That is a fact that it must be obtained by Mr. Geer or Mr. Bartels the right to use whatever copyrighted music you play, a permit must be obtained by Mr. Bartels and [fol. 836] Mr. Geer?

Mr. Roberts: Objected to as incompetent, leading.

Q. You use copyrighted music, don't you? A. Yes.

Q. Permits must be obtained for the use of that copyrighted music? A. Yes.

Q. Who obtains those permits?

A. The ballroom operator.

Q. For instance in your contract with Mr. Geer would it be Mr. Geer? A. Yes.

Q. And in the instance of Mr. Bartels would it be Mr. Bartels? A. That is right.

Q. The occasion on which you were short a piano player there was corrected by the engagement of a lady, the name, I believe was given as Mary Bodenstine. Do you recall that? A. Yes.

Q. Who procured Miss or Mrs. Bodenstine?

A. We came into town and must have talked to Mr. Geer and said we were short a pianist, and in some manner when I went on the job the pianist was there. I don't know, [fol. 837] there was some conjecture as to how she happened to be there, but when I walked into the ballroom she was sitting at the piano, the first time I had ever seen her.

Q. Was she one of your band or troop?

A. I had never seen her before. No.

Q. Did you engage her? A. No.

Q. She played with the orchestra?

A. She played that night.

Q. And when she played you understood her to be playing at Mr. Geer's request?

Mr. Roberts: Objected to as the witness is not shown competent. He has already testified that he does not know how she got there.

The Court: Overruled. (Plaintiffs except.)

A. I say that I did not contact her to come there.

Q. Did any of the sidemen? A. No.

Q. Well she could come only from one other place, the management; is that right?

Mr. Roberts: Objected to as calling for the conclusion and opinion of the witness; leading and suggestive.

The Court: Sustained. (Intervenor excepts.)

[fol. 838] Q. Now did you object to her playing with you that night? A. No.

Q. If either Mr. Geer or Mr. Bartels would have requested you on either of the nights you played for them under this Form B contract to have discharged a member or members of your orchestra would you have done so?

Mr. Roberts: Objected to as a selfserving declaration, incompetent, irrelevant and immaterial.

The Court: You may answer. (Plaintiffs except.)

A. I would have removed them from the stage.

Q. By that you mean you would not have permitted that person to have played for that performance?

A. Yes, sir; if he didn't want him on the stage, that's all.

Mr. Padway: You may cross-examine.

Cross-Examination.

By Mr. Thomas B. Roberts:

Q. As a matter of fact you would have given that man two weeks notice, wouldn't you, Mr. Moorhead, to get out of the band?

A. The point comes up there that if he didn't want him, he was still there and he would have to be paid if he didn't want him on the stage.

Q. You would still pay him?

A. Mr. Geer. It is always the booking office that pays.

[fol. 839] Q. This sideman you mentioned, you would have paid him?

A. I presume that would be necessary.

Q. That is, whether Mr. Geer wanted him or not; is that right? A. Yes.

Q. Now you mentioned Mrs. Bogenstine, you paid her, didn't you; you paid her $2.00 above the union scale?

A. I did. The union scale is very small.

Q. What is it up there? A. $5.00.

Q. You paid her $7.00? A. Yes, sir.

Q. You determined that rate; is that right?

A. Yes.

Q. You have heard of the American Society of Composers, Authors and Publishers?

A. Yes, sir.

Q. That is commonly known as ASCAP?

A. Yes, sir.

Q. You do not know the background as to how it came about that ASCAP licenses are required of ballrooms, do you?

A. Yes, I know how it came about.

Q. How did it?

A. It is a long speech.

Q. Well, some rule of ASCAP, is that right?

[fol. 840] A. Yes, to collect more money for the writers.

Q. For ASCAP. But you don't know anything about the arrangements that ASCAP might have had with either Mr. Geer or Mr. Bartels, do you?

A. No, I don't.

Q. What can you tell the court as to whether the next night following this engagement in which Mary Bogenstine played the piano that you played at the Crystal Ballroom the following night?

A. We did not play there the following night.

Q. Did you play in Des Moines the next night?

A. No; the following Saturday.

Q. You were short a piano player that night?

A. That is right.

Q. And did you get somebody to play the piano?

A. No.

Q. Isn't it true that you talked to some local player here?

A. I had a man call and try to locate somebody, it was Saturday night, and halloween, they were all working.

Q. But you had somebody call and try to locate someone?

A. Tried to fill it up to the number.

Mr. Roberts: I believe that is all.

Mr. Padway: That is all, Mr. Moorhead.

Witness Excused.

[fol. 841] Mr. Roberts: We served a notice to take the deposition of Jules Herman whom the record shows was one of the sidemen with Griff Williams' orchestra. The subpoena was served upon Mr. Herman, and he advised counsel for the parties that he was going to be out of town and would be unable to appear, he was going from Chicago to Washington, so the plaintiffs secured a short statement as to what he would testify to if he was called as a witness, and I also understand that the interveners procured a statement, and it has been agreed between counsel that we might stipulate that if Jules Herman were called and sworn as a witness in this cause, that is, the case of Bartels et al., versus Birmingham, that he would testify as follows:

I, JULES HERMAN, hereby state that during the time I was a member of Griff Williams' orchestra I always received from Griff Williams as compensation for my services in performing one night engagements as such member an amount in excess of the scale of wages of the American Federation of Musicians Local in whose jurisdiction such engagement was played; that the amount which I received

for my services as a member of Griff Williams' orchestra during its engagement at the Crystal Ballroom at Dubuque, Iowa, on September 1, 1941, was not less than Thirteen Dol-
[fol. 842] lars and Fifty Cents $13.50.

Mr. Cohen: If the court please, it was my understanding that the statement of Jules Herman was to include the supplement statement which the intervener obtained. The supplemental statement is as follows:

I, Jules Herman, hereby desire to make a further and an explanatory statement to that signed by me on the 5th day of December 1944, as follows:

For one night engagements, compensation for my services was delivered to me by Griff Williams during the time I was a member of the Griff Williams Orchestra. For many hotel engagements, specifically for engagements at the Palmer House in Chicago, played during the years 1941, 1942 and from March 17, 1943, through January 8, 1944, while a member of the orchestra, I received compensation for my services direct from the Palmer House.

During the time I was with the Griff Williams orchestra, I had no agreement written or oral which guaranteed employment for me and my income varied according to the number, type and length of the various engagements played by the orchestra.

Mr. Roberts: If the court please, we would like to object to the testimony contained in the last statement as immaterial and irrelevant.

[fol. 843] The Court: We will take it subject to the objection. (Plaintiffs except)

Mr. Roberts: It is hereby stipulated by counsel for the respective parties in this case as follows:

That Exhibit B-40 is a true and correct photostatic copy of a contract delivered by Music Corporation of America to the Palmer House, Chicago, Illinois, dated October 27, 1941, and covering an engagement by Griff Williams and his orchestra in the Empire Room in said Palmer House, which contract bears the genuine signature of Griff Williams.

That Exhibit B-41 is a true and correct photostatic copy of a contract delivered by Music Corporation of America to

the Copley Plaza, in Boston, Mass., dated January 15, 1942, and covering an engagement by Griff Williams and his orchestra at said Copley Plaza Hotel for the period from March 21, 1942 through April 30, 1942, which contract bears the genuine signature of Griff Williams.

That Exhibit B-42 is a true and correct photostatic copy of a contract delivered by the Music Corporation of America to the Inglaterra Ballroom, Peoria, Illinois, dated December 21, 1943, covering an engagement by Griff Williams and his orchestra at said ballroom, which contract bears the genuine signature of Griff Williams.

[fol. 844] That Exhibit B-43 is a true and correct photostatic copy of a contract delivered by the Music Corporation of America to the Baker Hotel, Dallas, Texas, dated May 22, 1942, for an engagement by Griff Williams and his orchestra at said Baker Hotel, which contract bears the genuine signature of Griff Williams.

That Exhibit B-44 is a true and correct photostatic copy of a contract delivered by the Music Corporation of America to the Palmer House, Chicago, Illinois, dated November 16, 1942, and covers an engagement by Griff Williams and his orchestra at said Palmer House.

It is further stipulated that Exhibits B-40, B-41, B-42, B-43 and B-44 shall be treated for all purposes the same as though each exhibit were the original contract of which it is a photostatic copy, and they are offered in evidence.

The Court: Any objection to those?

Mr. Padway: No.

The Court: All right. They are admitted.

Mr. Roberts: The purpose is to impeach some of the testimony that is in the deposition of Griff Williams. In the deposition Griff Williams testified that at the various hotels he listed the sidemen and identified the engagements as these particular contracts themselves.

Contract Blank

MUSIC CORPORATION OF AMERICA

MBL:D W

16 Old Bond St., W.I. LONDON Phone Regent 6505 | 745 Fifth Avenue NEW YORK Phone Wickersham 2-8600 | 430 N. Michigan Ave. CHICAGO Phone Delaware 1100 | M C A Building BEVERLY HILLS Phone Bradshaw 22211 | 111 Sutter Street SAN FRANCISCO Phone Exbrook 8822 | Union Commerce Bldg. CLEVELAND Phone Cherry 6010 | Tower Petroleum Bldg. DALLAS Phone 2-1449

THIS CONTRACT for the personal services of musicians, made this 27th day of OCTOBER, 1941

between the undersigned employer (hereinafter called the employer) and THIRTEEN (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH: That the employer employs the personal services of the employees as musicians severally, and the employees

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This contract is subject to cancellation by the Palmer House only, upong sixty days prior notice to the opening date, in writing to the Music Corporation of America.

Plaintiffs' Exhibit B-40.
Filed in U. S. District Court December 13, 1944.

633

[illegible] daily and Sunday
[illegible] 7:00 PM to 9:00 PM and 9:30 PM to 2:30 AM Saturday NO MONDAYS
It is also understood and agreed that if Thanksgiving comes within the duration of this contract, the Tea Dance Session will be played at Scale.

Price agreed upon $1900.00 per week
(Terms and amount)

To be paid WEEKLY
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer PALMER HOUSE

Accepted by Employer [signature]
ED LAWLESS

Street Address STATE AND MONROE

Accepted _____
(Orchestra Leader)

City or State CHICAGO, ILLINOIS

By MUSIC CORPORATION OF AMERICA
(Representatives of Employees)

Phone _____

By [signature]

FORM B.

NAMES OF EMPLOYEES | LOCAL NUMBER | S. S. NUMBER | WAGES

(Leader)

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
(Leader)			

Plaintiffs' Exhibit B-40.
Filed in U. S. District Court December 13, 1944.

635

Plaintiffs Exhibit B
12-12-44
H L K

FILED
DEC 13 1944
N. T. Reed
CLERK

Contract Blank

MUSIC CORPORATION OF AMERICA

16 Old Bond St., W 1	745 Fifth Avenue	430 N. Michigan Ave	M C A Building	111 Sutter Street	Union Commerce Bldg.	Tower Petroleum Bldg.
LONDON	NEW YORK	CHICAGO	BEVERLY HILLS	SAN FRANCISCO	CLEVELAND	DALLAS
Phone Regent 8508	Phone Wickersham 2-8900	Phone Delaware 1100	Phone Bradshaw 23211	Phone Exbrook 8922	Phone Cherry 6010	Phone 2-1468

THIS CONTRACT for the personal services of musicians, made this 15 day of January, 1942

between the undersigned employer (hereinafter called the employer) and Thirteen (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of GRIFF WILLIAMS, according to the following terms and conditions:

RIDER

Hotel agrees to provide and maintain network broadcasting facilities for at least two network broadcasts per week and to pay all Union taxes incidental thereto, direct to the Union, such cost not to exceed a total of $100.00 per week.

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Filed in U. S. District Court December 13, 1944. Plaintiffs' Exhibit B-41.

liability for the amount stated herein.

Name of Employer Mr. Chauncy De Pew Steele

Street Address Copley Plaza Hotel

City or State Boston, Mass.

Phone

FORM B

Accepted by Employer

Accepted (Orchestra Leader)

By MUSIC CORPORATION OF AMERICA
(Representatives of Employers)

By

637

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
(Leader)			

Plaintiffs' Exhibit B-43.
Filed in U. S. District Court December 13, 1944.

647

Pltfs Exhibit B-43
12/12-44
HEB

FILED
DEC 1 : 1944
N. T. Reed
CLERK

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
_____ (Leader)			

Contract Blank

JB:JA

MUSIC CORPORATION OF AMERICA

16 Old Bond St., W.1. LONDON Phone Regent 6606 | 745 Fifth Avenue NEW YORK Phone Wickersham 2 8900 | 430 N. Michigan Ave. CHICAGO Phone Delaware 1100 | M C A Building BEVERLY HILLS Phone Bradshaw 2121 | [illegible] SAN FRANCISCO Phone [illegible] | [illegible] CLEVELAND | [illegible] DALLAS Phone 2-[illegible]

THIS CONTRACT for the personal services of musicians, made this 21ST day of DECEMBER 194 3

between the undersigned employer (hereinafter called the employer) and FOURTEEN (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of GRIFF WILLIAMS AND HIS ORCHESTRA, according to the following terms and conditions:

Place of employment INGLATERRA BALLROOM, PEORIA, ILLINOIS

Date(s) of employment SUNDAY, JANUARY 16TH, 1943

Hours of employment 8:00 - 12:00

Price agreed upon $600.00 OR 60% OF THE GROSS RECEIPTS WITH A MINIMUM GUARANTEE OF $600.00. IT IS UNDERSTOOD BAND IS NOT TO RECEIVE LESS THAN $600.00 (Which price includes expenses agreed to be reimbursed by employer in accordance with a schedule to be furnished the employer on or before date of engagement.)

To be paid $300.00 DEPOSIT: BALANCE BY 11 PM NIGHT OF ENGAGEMENT (Specify when payments are to be made)

[illegible] will render under the specifications

Filed in U. S. District Court December 13, 194

Plaintiffs' Exhibit B-42.

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract. Music Corporation of America acts hereunder only as agent and assumes no liability hereunder to anyone.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claims is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer INGLATERRA BALLROOM
by Harold Newsam

Street Address 914 Main Street

City or State Peoria, Illinois

Phone

FORM B

Accepted by Employer Harold Newsam

Accepted (Orchestra Leader)

On behalf of

Approved By MUSIC CORPORATION OF AMERICA
(Representative of Employer)

By

Plaintiffs' Exhibit B-42.
Filed in U. S. District Court December 13, 1944.

641

Contract Blank

MUSIC CORPORATION OF AMERICA

16 Old Bond St. W. 1	745 Fifth Avenue	430 N. Michigan Ave.	M C A Building	111 Sutter Street	Union Commerce Bldg.	Tower Petroleum Bldg.
LONDON	NEW YORK	CHICAGO	BEVERLY HILLS	SAN FRANCISCO	CLEVELAND	DALLAS
Phone Regent 6506	Phone Wickersham 2-8900	Phone Delaware 1100	Phone Bradshaw 23211	Phone Exbrook 8922	Phone Cherry 6010	Phone 2 1448

THIS CONTRACT for the personal services of musicians, made this 22nd day of MAY, 194 2.

between the undersigned employer (hereinafter called the employer) and Thirteen (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of GRIFF WILLIAMS, according to the following terms and conditions:

Place of employment BAKER HOTEL

Date(s) of employment BEGINNING JULY 3, 1942, FOR FOUR (4) WEEKS.

Hours of employment Luncheons- 12 noon to 2 PM Mons. thru Fris. 12:30 to 2:30 PM Sats. None on Suns. DINNERS - 7:30 PM to 9:30 PM nightly. SUPPERS: 10 PM to 1:00 AM except Suns. Dinner Sundays from 10 PM to 12 Midnight.

Price agreed upon $ 1,500.00 WEEKLY - PLUS THREE (3) ROOMS. (Terms and amount)

To be paid WEEKLY (Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claims is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Plaintiff's Exhibit B-47, Filed in U. S. District Court December 13

Name of Employer BAKER HOTEL

Street Address

City or State DALLAS, TEXAS

Phone

Accepted by Employer

By: CLINTON BAKER

Accepted

(Orchestra Leader)

By MUSIC CORPORATION OF AMERICA
(Representatives of Employees)

By

Plaintiffs' Exhibit B-43.
Filed in U. S. District Court December 13, 1944.

645

Contract Blank

MUSIC CORPORATION OF AMERICA

MBL:DG

6 Old Bond St. W. 1	745 Fifth Avenue	430 N. Michigan Ave.	M C A Building	111 Sutter Street	Union Commerce Bldg.	Tower Petroleum Bldg.
LONDON	NEW YORK	CHICAGO	BEVERLY HILLS	SAN FRANCISCO	CLEVELAND	DALLAS
Phone Regent 6506	Phone Wickersham 2-8900	Phone Delaware 1100	Phone Bradshaw 23211	Phone Exbrook 8922	Phone Cherry 6019	Phone 3-1440

THIS CONTRACT for the personal services of musicians, made this: 16th day of NOVEMBER, 1942

between the undersigned employer (hereinafter called the employer) and [illegible] (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of [illegible] WILLIAMS, according to the following terms and conditions:

Place of employment [illegible], ILLINOIS

Date(s) of employment Opening approximately March 25 or April 1, 1943, and continuing indefinitely, subject to four weeks' notice.

Hours of employment 7:[illegible] PM to [illegible] PM and [illegible]:30 PM to 1:30 AM daily and Sunday [illegible] PM to [illegible] PM and [illegible] PM to 2:30 AM Saturday NO MONDAYS. It is also understood and agreed that if Thanksgiving comes within the [illegible] of this contract, the [illegible] Dance Session will be played at scale:

Price agreed upon $2000.00 per week (Terms and amount)

To be paid [illegible] (Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claims is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Plaintiffs' Exhibit B-44.
Filed in U. S. District Court December 13, 1944.

[fol. 860] Mr. Roberts: It is hereby stipulated by counsel for the respective parties in this case that the plaintiffs in the Bartels case paid as the contract price in the case of the engagements of the hereinafter named orchestras the amounts as follows:

Paul Carlson and His Orchestra	$250.00
Tiny Hill and His Orchestra	$250.00
Boyd Raeburn and His Orchestra	$175.00
Buddy Fisher and His Orchestra	$100.00.

Is that agreed to?

Mr. Cohen: Yes. We will agree to that.

Mr. Padway: Is it conceded that the leaders and sidemen of all the orchestra identified in this action were members in good standing of the American Federation of Musicians?

Mr. Charlton: If it is a fact?

Mr. Padway: It is a fact.

The Court: With reference to the three motions made by the plaintiffs to strike at the close of the testimony of the witness Hild, as I suggested, so far as I am advised at the present time, I would say that motions 1, 2 and 3 should be sustained insofar as they were expressions of opinion by the witness as to the effect of actions that were taken and insofar as he may have testified as to the contents of contracts [fol. 861] or any writings or letters, to which there was an objection at the time, but as all the evidence went in under objections they were offered subject to the objection, and I think there is nothing new in these motions that should be considered by the court aside from those objections, and it will be permitted to stand subject to the objections with the assurance to counsel that this court is not going to be carried away by incompetent and irrelevant testimony, but the evidence was taken in the record and I think it should stand. (All parties except.)

Mr. Charlton: The plaintiffs rest.

Mr. Cohen: The Government rests.

Mr. Padway: We rest.

(Recess 3:05 p. m. to 3:20 p. m.)

* * * * * *

[fol. 864] (Opinion, Findings of Fact and Conclusions of Law of District Court.)

Filed in U. S. District Court January 5, 1945.

United States District Court, Southern District of Iowa, Central Division.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, doing business as Crystal Ballroom, Plaintiffs,
No. 294 vs. Civil Action
E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant.

Griff Williams, et al., Interveners.

Larry V. Geer and Margaret Geer, doing business as Larry Geer Ballrooms, Plaintiffs,
No. 328 vs. Civil Action
E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant.

The above entitled actions came on for hearing on their merits on December 11, 1944, at Des Moines. Evidence was introduced, arguments had and the cases submitted on their merits, with additional written briefs.

The two actions were consolidated for trial and one opinion and one findings of fact will be applicable to each case.

The actions were brought by certain operators of ballrooms in Iowa against the Collector of Internal Revenue to recover taxes paid to him under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act upon a claim by the Commissioner of Internal Revenue that such operators were the employers of certain orchestra leaders and their "sidemen" (members of the orchestras) on the dates of their respective engagements.

[fol. 865] Such orchestras and their leaders and the dates of their respective engagements for the plaintiffs in Civil Action No. 294 are as follows:

Griff Williams and his orchestra	Sept. 1, 1941.
Bill Carlson and his orchestra	Aug. 17, 1941.
Tiny Hill and his orchestra	Sept. 28, 1941.
Boyd Raeburn and his orchestra	Oct. 5, 1941.
Buddy Fisher and his orchestra	Nov. 23, 1941.
Paul Moorhead and his orchestra	Jan. 18, 1942.

Such orchestras and their leaders and the dates of their respective engagements for the plaintiffs in Civil Action No. 328 are as follows:

Al Menke and his orchestra	Oct. 12, 18, 1941. Nov. 8, 26, 1941. Nov. 26, 1942.
Les Hartman and his orchestra	Feb. 5, March 5, Apr. 2, May 7, June 4, July 2, Aug. 6, Sept. 3 & Oct. 1, 1942.
Jimmy Barnett and his orchestra	Jan. 1, 5, 24, Apr. 25, June 16, July 2, 3, 4, Aug. 1, 8, Sept. 12, Oct. 4, Nov. 7, 14, 15, 17, Dec. 5, 6, 22, all in 1942.
Paul Moorhead and his orchestra	Feb. 17, 22, March 21, 22, Apr. 18, May 2, 9, 16, 28 & 31, June 2, 30, July 11, 12, 14, 16, Oct. 10, 11, 12, 24, all in 1942.
Blue Barron and his orchestra	Aug. 26, 1941, & July 4, 5 and 9, 1942.
Doc Lawson and his orchestra	July 4, 1942.

In Civil Action No. 294 the leaders of the orchestras have intervened and filed answers designating themselves as defendants.

Plaintiffs claim that they were not the employers of the leaders and the sidemen within the meaning of the taxing statutes but that each leader was an independent contractor and the sidemen were solely his employees.

[fol. 866] It is established by the taxing statutes, the common law and the regulations of the Commissioner of Internal Revenue that in order to constitute an employment within the meaning of the taxing acts the legal relationship of employer-employee must exist between the person for whom the services are performed and the individual who performed them and that an independent contractor and his men are not such employees.

Secs. 1001, et seq., Title 42, U.S.C.; Secs. 1400, 1410, 1600, 1607, Title 26, U.S.C., Internal Revenue Code.

Sec. 402.204, Internal Revenue Regulation 106.

Texas Company vs. Higgins, 118 F.2d 636.

Indian Refining Co. vs. Dallman, 119 F.2d 417.

Williams vs. United States, 126 F.2d 129.

[illegible] Collector, vs. Empire Star Mines, 129 F.2d 914.

[illegible]ty Music Hall Corpn. vs. U.S., 135 F.2d 715.

[illegible]l Co. vs. Fly, 135 F.2d 491.

Fahs vs. Orange State Oil Co., 138 F.2d 743.

Glenn vs. Beard, 141 F.2d 376.

U.S. vs. Mutual Trucking Co., 141 F.2d 655.

Jones vs. Goodson, 121 F.2d 176.

In the last cited case, 121 F.2d 176, a definition of what constitutes an independent contractor is set forth, p. 179, as follows:

"Little difficulty has been encountered in defining in the abstract the relationship of master and servant and that of an independent contractor, and in drawing the line of distinction between the two. The relationship of master

and servant exists where the employer has the right to direct and control the method and manner in which the work shall be done and the result to be accomplished, while an independent contractor is one who engages to perform service for another according to his own method and manner, free from direction and control of the employer in all matters relating to the performance of the work, except as to the result or the product. The line of separation between the two is the degree of direction and control. In the former, direction and control over both method and manner of doing the work and the result produced; in the latter, direction and control are limited to the result and do not apply to the method and manner of the service rendered."

Orchestras of this type known as "name orchestras" or "name bands", originate by some individual who believes that he can create an organization which will be employed for entertainment purposes by dancehall operators, hotels, radio programs and public and private parties.

The leader is highly individualistic, featuring his own name as leader, and his success or failure to a great extent depends upon his musical ability, power to create an out-[fol. 867] standing, or at least, a distinctive or specialized style and method of rendering music and his showmanship. He uses every adroit means of advertising available to him and to please his customers. Organization and success mean an expenditure of sums of money for music and accessories, salaries or promise of rewards during the formation of the orchestra, for rehearsals, and the musicians must be suitably and distinctively dressed.

Appearances are usually for one night but there may be repeats. The business is highly competitive. Many fall by the wayside, others attain phenomenal success. Success or failure depends to a great extent upon the leader, although the ability of the individual members should not be decried. The orchestras here in controversy are primarily dance orchestras. When an orchestra has been built up so that a demand is created for its services, the leaders generally employ booking agents to secure appearances in ballrooms or other places seeking their particular form of entertainment.

The evidence establishes that the leaders at all times exercised the entire direction and control over their orchestras and the method and manner of doing the work. They, of course, exercised the right to engage such members of the orchestra and to dispense with their services as they saw fit, to arrange for and pay their wages, to keep all profits and sustain and pay such losses as might occur, pay transportation and incidental expenses and direct and control the orchestra during engagements. None of the musical instruments are furnished by the customer, except the piano, which is part of the equipment of the establishment in which they perform. The leader created and established and had for sale an independent business and the ballroom operator was interested only in the result of the performance.

This situation creates and shows that the orchestra leaders were independent contractors and at the time of their engagements the members of the orchestras were employees of such independent contractors.

[fol. 868] Griff Williams vs. United States, 126 F.2d 129, (certiorari denied, Oct. 12, 1942).

Aberdeen Aerie No. 24 vs. United States, 50 F. Supp. 734.

In re Ten Eyck Co., Inc., 41 F. Supp. 375.

Longo vs. Glenn, by U.S.D.C. for W. D. Ky. Nov. 20, 1943, (CCH, Fed. Unemployment Ins. Service, par. 9088).

Biltgen vs. Reynolds, by U.S.D.C. for Minn., 1943, (CCH, Fed. Unemployment Ins. Service, par. 9046).

Spillson vs. Smith, by U.S.D.C. for N. D. Ind., Feb. 15, 1944, (CCH, Fed. Unemployment Ins. Service, par. 9111).

Los Angeles Athletic Club vs. U.S., by U.S.D.C. for S. D. Calif., Feb. 25, 1944, (CCH, Fed. Unemployment Ins. Service, par. 9104).

The Commissioner of Internal Revenue evidently would accept this conclusion were it not for a contract between the parties, known in the record as "Form B", as he has refunded to the plaintiffs in Civil Action No. 294 all such taxes collected where the contract Form B was not used.

This Form B contract has a history. Sometime ago the American Federation of Musicians had prepared and required all orchestra leaders and their booking agents to use when arranging for engagements a contract providing in general terms that the owners of the establishments or persons engaging their services were employers and the musicians of the orchestras their employees. A trial court found that this position was correct but on appeal it was held that this contract did not change the relationship from that of an independent contractor to that of employer and employee. See Griff Williams vs. United States, 126 F.2d 129. The finding by the court that under such a contract the orchestra leader was still an independent contractor was accepted by the Commissioner as indicated by the refund above referred to.

While this litigation was in progress the American Federation of Musicians had prepared and sent to each local of the musicians' union a suggested contract known as Form B, together with a letter from the President of that union stating that it must be used for all engagements after June 1, 1941, and that it had been adopted by the international executive board "for the purpose of protecting our members under the Social Security Laws."

[fol. 869] Since that time Form B has been used and was so used in each of the engagements here under consideration. It provides, as did the other preceding contracts, that the owners of the amusement establishment were the employers of the leaders and the individual members of the orchestras, but added the provision that it was an employment by the owner for the personal services of the employees as musicians severally, and that—

"The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract."

The contract also gave the name of the leader, name and address of the place of engagement, the time, the hours to be worked, and the price agreed upon (which was substantial) and when it was to be paid.

It is the contention of the Government and the intervenors that these contracts (Form B) are conclusive of an employer-employee relationship. I cannot agree. It may

be an element that may be considered by the fact finder if of any assistance in determining what is the true relationship.

The leading case on the subject of the conclusive effect of such contracts is perhaps Griffiths vs. Commissioner, 308 U.S. 355, 358, wherein that court said:

"Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed .... Taxes cannot be escaped 'by anticipatory arrangements and contracts however skilfully devised.....'"

And in Moline Properties vs. Commissioner, 319 U.S., 436, 439, it is said:

"In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal."

And there are authorities holding that, in tax matters, the courts are not interested in the terminology of the contract but that they look to the true situation to see whether there is in fact an employer-employee relationship or the relationship of an independent contractor.

[fol. 870] Willard Sugar Co. vs. Gentsch, by the U.S.D.C. for N.D.O., March 3, 1944, (CCH Unemployment Ins. Service, par. 9106).

Mateovitch vs. Anglin, 134 F.2d 834.

McDermott vs. Hendrickson, 45 F. Supp. 277.

And the same rule applies in numerous workmen compensation and tort cases.

Gulf Refining Co. vs. Brown, 93 F.2d 870.

In re Horton, 284 N.Y. 167.

Industrial Com. vs. N. W. Mutual Life Ins. Co., 103 Col. 550, 88 Pac. 2d 560.

Jack & Jill, Inc., vs. Tone, 126 Conn. 114, 9 At. 2d 497.

Sanford vs. Goodbridge, 13 N.W. 2d 486 ..., Ia. ....

Glielmi vs. Netherland Dairy Co., 254 N.Y. 62, 171 NE 907.

Nestle's Food Co. vs. Industrial Com., 205 Wis. 467, 237 N.W. 117.

Brown vs. Industrial Ac. Com. of Calif., 174 Cal. 457, 163 Pac. 664.

And the Commissioner of Internal Revenue has by regulation long recognized this rule of the common law.

Sec. 402.204 of the Regulation 106.

I am satisfied that what is the true relationship is a fact question and in considering and determining the question of the true relationship of the parties here the court should take into consideration the fact that the contract was not entered into by fair negotiations between the parties, but upon demand of the musicians' union and the requirement that it must be signed or no orchestra could be obtained; that it was required to be executed with the avowed purpose and intent of protecting the leader from taxes as an employer.

And the contract should also be appraised in connection with the circumstances that both preceded and followed its execution. Butler Bros vs. N.L.R.B., 134 F.2d 981, 985.

It is apparent from the evidence that there was no difference in the conduct and control of the orchestra by the leader after June 1941. The intervenor Mr. Paul Moorhead was asked if he would terminate the services of one of the members of his orchestra at the request of the ballroom owner, and, after hesitating, said that he would ask the member to step down from the rostrum.

[fol. 871] Even if this hypothetical situation had occurred, and the evidence does not disclose that it ever did, still it would be no more than Mr. Moorhead would have done before the Form B contract was introduced, as he was desirous of pleasing the person employing his services and would go to any extent to defer to any wish of the owner so long as it did not interfere with his actual control over the orchestra. The matters testified to by Mr. Moorhead were inconsequential as to the real question in issue.

The difficulty which appears to bother the Commissioner is the provision of the contract giving to the owner the right of control. It seems to be his thought that as this right of

control was given to the ballroom operator by the contract the fact that such control was not exercised by him but continued to be exercised by the leader of the orchestra could not change his right of control which determines the relationship of employer and employee. In other words, he is apparently not able to perceive how this right could be taken away or proven not to exist even though it was not exercised.

But why, in determining the true relationship, disregard parts of the written contract and not others? One answer is that under the situation here shown such right could not be exercised. If the owner attempted to exercise any such right of taking charge and control of the orchestra it would destroy the orchestra and the result of a satisfactory entertainment. It just could not be done. The leader in each instance controlled the details and the manner of the performance of the members of the orchestra, and the evidence of actual control is sufficient to warrant a finding of the right of actual control.

The purpose of a contract is to express the intention of the parties regarding the subject matter. As between the parties the agreement is generally conclusive as to such intent, but as against a third person the true intent may be shown. It gets us back to the pronouncement of the Supreme Court above referred to in 308 U. S. 355, 358, that—

[fol. 872] "Taxes cannot be escaped 'by anticipatory arrangements and contracts however skilfully devised . . .' "

I therefore make the following findings of fact and conclusions of law.

Findings of Fact.

1. That at all times, and during the times of the performance by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work. Such leader exercised and had the exclusive right to hire and fire such members, to contract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances. Such leader organized, managed and controlled such orches-

tras as an independent organization for hire, and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue statutes.

2. The contract, Form B, was not entered into by fair negotiation between the parties; but upon demand of the musicians' union and the leaders of the orchestras that it must be entered into or no orchestra could be obtained, and it was required to be so executed with the avowed purpose of protecting the leader from taxes as an employer. It was required by the leader to be entered into as an anticipatory arrangement to escape taxation.

There was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestras, subsequent to June 1941, or by reason of the Form B contract, than there was before that time, and the true relationship at all times as between the plaintiffs and such leaders was that the latter were independent contractors.

[fol. 873] 3. At the time of the execution of the contracts, Form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen; or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestra or any of the sidemen, or the method or manner of doing its or their work in any particular.

4. Considering all the facts and circumstances as disclosed by the evidence, including the contract Form B and its execution, none of the plaintiffs was at the time of the performances of the several orchestras on their premises the employer of the leader or of any of the members of the orchestras within the meaning of the Internal Revenue statutes.

Conclusions of Law.

1. The court has jurisdiction of the subject matter and of the parties.

2. That at the time of the engagements of the orchestras with the ballroom operators, plaintiffs in these cases, the leader and the members of such orchestras were not the employees of the plaintiffs, within the meaning of the Internal Revenue acts.

3. That at the time of the engagements of the orchestras with the ballroom operators, plaintiffs in these cases, the leader of such orchestra was an independent contractor and the members of his orchestra were his employees.

4. That the conclusions arrived at by the court herein make it unnecessary to decide other questions raised by the plaintiffs.

5. Plaintiffs are entitled to the relief demanded and for judgment of the amount of the taxes paid with interest.

6. That all of the costs should be taxed against the defendant and the intervenors, except the costs that were exclusively made in Cause No. 328 and such costs should be taxed against the defendant in that case.

[fol. 874] The attorneys for the plaintiffs may prepare a judgment entry in each case, setting forth the amount of the judgment and costs, and submit it to the attorneys for the Government in conformity with the local rules of this court.

In each case defendants and interveners except to each findings of fact and conclusions of law.

Signed at Des Moines, Iowa, this 5th day of January, 1945.

CHAS. A. DEWEY,
United States District Judge.

[fol. 875] (Judgment in Case No. 294 Civil Action.)

Filed in U. S. District Court January 20, 1945.

United States District Court, Southern District Of Iowa, Central Division.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, d/b/a Crystal Ballroom, Plaintiffs,
Civil Action. vs. No. 294.
E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant.
Griff Williams, et al., Interveners.

This cause having come on for trial before the Court on December 11, 1944, and the evidence adduced by the parties

having been heard, and the court having made its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged And Decreed, That Plaintiffs recover of the Defendant the sum of $20.98, with interest at the rate of 6% per annum from the 5th day of May, 1943, and that Plaintiffs recover of the Defendant and the Intervenors their costs expended herein in the amount of $271.69. Defendants and Intervenors except.

Dated January 20th, 1945.

Enter:

CHAS. A. DEWEY,
Judge.

Approved as to form.

CLOID I. LEVEL,
Asst. U. S. Attorney.

Judgment entered in Civil Order Book 3, Page 287 and entered in Civil Docket No. 3, Page 44.

[fol. 876] (Judgment in Case No. 328 Civil Action.)

Filed in U. S. District Court January 20, 1945.

This cause having come on for trial before the Court on December 11, 1944, and the evidence adduced by the parties having been heard, and the court having made its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged And Decreed, That Plaintiffs recover of the Defendant the sum of $401.08, with interest at the rate of 6% per annum from the 4th day of August, 1943, and that Plaintiffs recover of the Defendant their costs expended herein in the amount of $46.96.

Defendants except.

Dated January 20th, 1945.

Enter:

CHAS. A. DEWEY,
Judge.

Approved as to form.

CLOID I. LEVEL,
Asst. U. S. Atty.

Judgment entered in Civil Order Book 3, Page 288 and in Civil Docket No. 3, Page 78.

[fol. 877] Notice Of Appeal By E. H. Birmingham, Individually And As Collector Of Internal Revenue For The State Of Iowa.

Filed in U. S. District Court April 14, 1945.

Notice is hereby given this 14th day of April, 1945, that E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment of this Court entered on the 20th day of January, 1945, in favor of Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, d/b/a Crystal Ballroom, plaintiffs, and against E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, and ordering, judging and decreeing that plaintiffs recover of the defendant, E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, the sum of $20.98 and interest thereon and also for costs.

MAURICE F. DONEGAN,
United States Attorney

CLOID I. LEVEL,
Assistant U. S. Attorney

HAROLD D. COHEN,
Special Assistant to the Attorney General

Attorneys for Defendant.

Des Moines, Iowa, April 14, 1945.

Copies mailed to Chauncey A. Weaver and Joseph A. Padway, Attys. for Interveners, and to Thomas B. Roberts and Clyde B. Charlton, Attorneys for Plaintiffs, at Des Moines, Iowa, April 14, 1945.

N. F. REED,
Clerk, U. S. District Court,
By Justine Hummel,
Deputy.

[fol. 878] Notice Of Appeal By Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher And Paul Moorhead, Intervenors.

Filed in U. S. District Court April 13, 1945.

Notice is hereby given this 13 day of April, 1945 that Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, intervenors, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Judgment of this court entered on the 20th day of January, 1945, in favor of Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, d/b/a Crystal Ballroom, plaintiffs, and against E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, and ordering, judging and decreeing that plaintiffs recover of the defendant and the said intervenors the cost expended.

CHAUNCEY A. WEAVER,
325 Insurance Exchange
Des Moines, Iowa.

JOSEPH A. PADWAY

ROBERT A. WILSON
736 Bowen Building
Washington 5, D. C.

Attorneys for Intervenors.

Des Moines, Iowa, April 13, 1945.

Copy of Notice of Appeal mailed to Thomas B. Roberts and Clyde B. Charlton, Des Moines, Iowa, attorneys for plaintiff, and to the United States Attorney, Des Moines, Iowa, attorney for the defendant, April 13, 1945.

N. F. REED,
Clerk, U. S. District Court
By Gertrude Darrell,
Deputy.

[fol. 879] (Notice of Appeal by E. H. Birmingham, Individually and as Collector of Internal Revenue for State of Iowa, in Case No. 328 Civil Action.)

(Filed in U. S. District Court April 14, 1945.)

Notice is hereby given this 14th day of April, 1945, that E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment of this Court entered on the 20th day of January, 1945, in favor of Larry V. Geer and Margaret Geer, d/b/a Geer Ballrooms, plaintiffs, and against E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, and ordering, judging and decreeing that plaintiffs recover of the defendant, E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, the sum of $401.08 and interest thereon and also for costs.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant U. S. Attorney.

HAROLD D. COHEN,
Special Assistant to the Attorney General.

Attorneys for Defendant.

Des Moines, Iowa. April 14, 1945.

Copy mailed to Thomas B. Roberts, and Clyde B. Charlton, Attorneys for Plaintiff, at Des Moines, Iowa, April 14, 1945.

N. F. REED,
Clerk, U. S. District Court.
By Justine Hummel,
Deputy.

[fol. 884] (Designation of Defendant of Matters to be Contained in Transcript on Appeal in Case No. 294 Civil Action.)

Filed in U. S. District Court, July 3, 1945.

To the Clerk of the District Court of the United States for the Southern District of Iowa, Central Division:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the Appeal of the said United States Circuit Court of Appeals for the Eighth Circuit heretofore filed by the defendant:

1. The Complaint filed January 3, 1944.

2. The Amendment to the Complaint filed March 22, 1944.

3. Answer of defendant E. H. Birmingham, individually and as Collector for the State of Iowa, filed March 31, 1944.

4. Respective Motions of Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to intervene in this action.

5. The respective Orders of the Court granting leave to Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to intervene in this action.

[fol. 885] 6. The respective Answers of Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to the Complaint and amended Complaint.

7. The complete transcript of the testimony and all Stipulations stipulated and all orders dictated into the Record and all Exhibits submitted at the trial before Judge Dewey, excepting Exhibits 8, B-2, B-3, B-4 and B-5.

8. The complete Transcript of the Deposition of intervener Griff Williams.

9. The complete Transcript of the Deposition of James K. Breyley and Joseph L. Kayser.

10. The Memorandum Opinion with Findings of Fact and Conclusions of Law.

11. The Judgment of January 20, 1945 against defendant and Interveners.

12. The Joint Notice of Appeal of Interveners.

13. The Notice of Appeal of Defendant Birmingham, with date of filing, to-wit, April 14, 1945.

14. Orders extending the time for filing Record on Appeal and docketing the same.

15. This Designation of the Record.

16. Clerk's Certificate.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant U. S. Attorney.

WM. R. SHERIDAN,
Assistant U. S. Attorney.

HAROLD D. COHEN,
Special Assistant to the Attorney General.

Attorneys for Defendant,
202 U. S. Court House,
Des Moines, Iowa.

Service of a copy of this designation of contents of record on appeal acknowledged this 3rd day of July, 1945.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
Attorneys for Plaintiff-Appellee.

JAS. R. PADWAY,
CHAUNCEY A. WEAVER,
Attorneys for Defendants-Interveners.

Dated this 3rd day of July, 1945.

[fol. 886] (Designation of Defendant of Matters to be Contained in Transcript on Appeal in Case No. 328 Civil Action.)

Filed in U. S. District Court, July 3, 1945.

To the Clerk of the District Court of the United States for the Southern District of Iowa, Central Division:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the Appeal to the said United States Circuit Court of Appeals for the Eighth Circuit heretofore filed by the Defendant:

1. The Complaint filed July 20, 1944.

2. Answer of Defendant E. H. Birmingham, Individually and as Collector for the State of Iowa, filed August 29, 1944.

3. The complete transcript of the testimony and all Stipulations stipulated and all orders dictated into the Record and all Exhibits submitted at the trial before Judge Dewey, excepting Exhibits 8, B-2, B-3, B-4, and B-5.

4. The Memorandum Opinion with Findings of Fact and Conclusions of Law.

5. The Judgment of January 20, 1945, against Defendant, and Interveners.

6. The Notice of Appeal of Defendant Birmingham, with date of filing, to-wit, April 14, 1945.

[fol. 887] 7. Orders extending the time for filing Record on Appeal and docketing the same.

8. This Designation of the Record.

9. Clerk's Certificate.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant U. S. Attorney.

WM. R. SHERIDAN,
Assistant U. S. Attorney.

HAROLD D. COHEN,
Special Assistant to the Attorney General.

Attorneys for Defendant,
202 U. S. Court House,
Des Moines, Iowa.

Service of a copy of this designation of contents of record on appeal acknowledged this 3rd day of July, 1945.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,

Attorneys for Plaintiff-Appellee.

Dated this 3rd day of July, 1945.

[fol. 888] (Designation of Interveners of Matters to be Contained in Transcript on Appeal in Case No. 294 Civil Action.)

Filed in U. S. District Court, July 3, 1945.

Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill, Interveners Appellants, designate the following as the record on appeal herein:

1. The Complaint.

2. The Amended Complaint.

3. The Answer of Defendant Birmingham.

4. The respective Motions of Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to intervene in this action.

5. The respective Orders of the Court granting leave to Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to intervene in this action.

6. The respective Answers of Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to the Complaint and Amended Complaint.

[fol. 889] 7. The complete Transcript of the Testimony and all Exhibits submitted at the Trial before Judge Dewey.

8. The complete Transcript of the Deposition of Intervener Griff Williams.

9. The complete Transcript of the Depositions of James K. Breyley and Joseph L. Kayser.

10. The Memorandum Opinion with Findings of Fact and Conclusions of Law of Judge Dewey.

11. The Judgment of January 20, 1945 against Defendant and Interveners.

12. The Joint Notice of Appeal of Interveners.

13. The Notice of Appeal of Defendant Birmingham.

14. This Designation of Record.

15. Clerk's Certificate.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington 5, D. C.

Attorneys for Interveners.

MAURICE F. DONEGAN,
CLOID I. LEVEL,
WM. R. SHERIDAN,
HAROLD D. COHEN,
Attorneys for Defendant.

Dated this 3rd day of July, 1945.

Service of a copy of this designation of contents of record on appeal acknowledged this 3rd day of July, 1945.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
Attorneys for Plaintiff-Appellee.

[fol. 890] Clerk's Certificate to Transcript.

United States of America,
Southern District of Iowa.—ss.:

I, N. F. Reed, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 890 pages to contain a full, true and complete transcript of the record in No. 294-Civil Action, Central Division, Roy Bartels, et al., Plaintiffs, vs. E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant, and in No. 328-Civil Action, Central Division, Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, Plaintiffs, vs. E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant, as called for in the Designations of the Record on Appeal filed July 2, 1945, as full, true and complete as the originals thereof on file and of record in office in the City of Des Moines, in said District.

Seal
U. S. Dist. Court
Southern Dist. of
Iowa

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at office in the City of Des Moines, in said District, this 5th day of July, A. D., 1945.

N. F. REED,
Clerk, U. S. District Court,
Southern District of Iowa.

Nos. 13124-25. Filed Jul. 7, 1945. E. E. Koch, Clerk.

No. 13127. Filed Jul. 10, 1945. E. E. Koch, Clerk.

[fol. 891] (Order Consolidating Cases for Hearing, for Printing of Single Record and Single Briefs, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1945.

Monday, August 27, 1945.

E. H. Birmingham, Individually, and as Collector, etc.,
Appellant,
No. 13124. vs.
Roy Bartels, et al.

Appeal from the District Court of the United States for the Southern District of Iowa.

E. H. Birmingham, Individually, and as Collector, etc., Appellant,
No. 13125. vs.
Larry V. Geer, et al.

Appeal from the District Court of the United States for the Southern District of Iowa.

and

Griff Williams, et al., Appellants,
No. 13127. vs.
Roy Bartels, et al.

Appeal from the District Court of the United States for the Southern District of Iowa.

In these causes counsel for the respective parties have filed a joint motion for consolidation of the appeals so that one printed record will suffice and also one brief for the respective parties, and a stipulation has also been filed that the time for the filing of the printed record and the briefs of the Collector and Interveners may be extended to and including September 20, 1945, and in pursuance thereof,

These causes are by the Court therefore consolidated for the hearing of the appeals in this Court, for the printing of a single record in the three cases, and filing of a single brief for each of the respective parties in the three cases. The stipulation is approved by the Court, and the time extended for the filing of the printed record and filing of the briefs of the Collector and Interveners to and including September 20, 1945.

August 27, 1945.

[fol. 892] (Designation and Stipulation for omission of parts of record and exhibits in printing.)

On October 4, 1945, a Designation for omissions in printing record and a Stipulation for printing of only parts of certain exhibits were filed in the United States Circuit Court of Appeals and the printed record in these cases has been prepared pursuant to such Designation and Stipulation.

[fol. 676] And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Mr. Samuel O. Clark, Jr., and Mr. Sewall Key as Counsel for Appellant in Cause No. 13,124.)

United States Circuit Court of Appeals

Eighth Circuit

E. H. Birmingham, Individually and as Collector of Internal Revenue, Appellant,
No. 13,124. vs.
Roy Bartels, et al., d/b/a Crystal Ballroom.

The Clerk will enter our appearance as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 7, 1945.

(Appearance of Mr. A. F. Prescott and Mr. Harold D. Cohen as Counsel for Appellant in Cause No. 13,124.)

The Clerk will enter our appearances as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
HAROLD D. COHEN,
Special Assistants to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 29, 1945.

[fol. 677] (Appearance of Mr. Lyle M. Turner as Counsel for Appellant in Cause No. 13,124.)

The Clerk will enter my appearance as Counsel for the Appellant.

LYLE M. TURNER,
Special Asst. to the Attorney General,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

(Appearance of Mr. Clyde B. Charlton and Mr. Thomas B. Roberts as Counsel for Appellees in Cause No. 13,124.)

The Clerk will enter my appearance as Counsel for the Appellees.

CLYDE B. CHARLTON,
THOMAS B. ROBERTS.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 6, 1945.

(Appearance of Mr. Gordon Diesing as Counsel for Amicus Curiae, Nebraska National Hotel Company, in Cause No. 13,124.)

The Clerk will enter my appearance as Counsel for the applicant as Amicus Curiae.

GORDON DIESING,
Attorney,
1530 City Natl. Bank,
Omaha, Nebr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

[fol. 678] (Appearance of Mr. Samuel O. Clark, Jr., and Mr. Sewall Key as Counsel for Appellant in Cause No. 13,125.)

United States Circuit Court of Appeals

Eighth Circuit

E. H. Birmingham, Individually and as Collector of Internal Revenue, Appellant,

No. 13,125. vs.

Larry V. Geer and Margaret Geer d/b/a Larry Geer Ballrooms.

The Clerk will enter our appearances as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 7, 1945.

(Appearance of Mr. A. F. Prescott and Mr. Harold D. Cohen as Counsel for Appellant in Cause No. 13,125.)

The Clerk will enter our appearances as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
HAROLD D. COHEN,
Special Assistants to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 29, 1945.

[fol. 679] (Appearance of Mr. Lyle M. Turner as Counsel for Appellant in Cause No. 13,125.)

The Clerk will enter my appearance as Counsel for the Appellant.

LYLE M. TURNER,
Special Asst. to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

(Appearance of Mr. Clyde B. Charlton and Mr. Thomas B. Roberts as Counsel for Appellees in Cause No. 13,125.)

The Clerk will enter my appearance as Counsel for the Appellees.

CLYDE B. CHARLTON,
THOMAS B. ROBERTS.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 6, 1945.

(Appearance of Mr. Gordon Diesing as Counsel for Amicus Curiae, Nebraska National Hotel Company, in Cause No. 13,125.)

The Clerk will enter my appearance as Counsel for the Amicus Curiae, Nebraska National Hotel Company.

GORDON DIESING.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

[fol. 680] (Appearance of Mr. Chauncey A. Weaver as Counsel for Appellant in Cause No. 13,127.)

United States Circuit Court of Appeals
Eighth Circuit

Griff Williams, et al., Appellants,
No. 13,127. vs.
Roy Bartels, et al.

The Clerk will enter my appearance as Counsel for the Appellants.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines, Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 10, 1945.

(Appearance of Mr. Joseph A. Padway as Counsel for Appellants in Cause No. 13,127.)

The Clerk will enter my appearance as Counsel for the Appellants.

JOSEPH A. PADWAY,
736 Bowen Bldg.,
Washington 5, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 14, 1945.

[fol. 681] (Appearance of Mr. Thomas B. Roberts and Mr. Clyde B. Charlton as Counsel for Appellees in Cause No. 13,127.)

The Clerk will enter my appearance as Counsel for the Appellees.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
40th Floor,
Empire Bldg.,
Des Moines, Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 18, 1945.

(Appearance of Mr. Gordon Diesing as Counsel for Amicus Curiae, Nebraska National Hotel Company, in Cause No. 13,127.)

The Clerk will enter my appearance as Counsel for the Amicus Curiae, Nebraska National Hotel Company.

GORDON DIESING.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

[fol. 682] (Order of Submission in Causes Nos. 13,124, 13,125 and 13,127.)

United States Circuit Court of Appeals

Eighth Circuit

January Term, 1946.

Monday, January 7, 1946.

E. H. Birmingham, Individually and as Collector of Internear Revenue for the State of Iowa, Appellant,
No. 13,124. vs.
Roy Bartels, et al., d/b/a Crystal Ballroom.

Appeal from the District Court of the United States for the Southern District of Iowa.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,
No. 13,125. vs.
Larry V. Geer, et al., d/b/a Larry Geer Ballrooms.

Appeal from the District Court of the United States for the Southern District of Iowa.

and

Griff Williams, et al., Interveners, Appellants,
No. 13,127. vs.
Roy Bartels, et al., d/b/a Crystal Ballroom.

Appeal from the District Court of the United States for the Southern District of Iowa.

These causes having been called for hearing in their regular order, application of Nebraska National Hotel Com-
[fol. 683] pany for leave to file brief as Amicus Curiae is presented by Mr. Gordon Diesing and granted by the Court, there being no objection by counsel.

Arguments on the merits was commenced by Mr. Lyle M. Turner, Special Assistant to The Attorney General, for E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, continued by Mr. Thomas B. Roberts and Mr. Clyde B. Charlton for appellees Roy Bartels, et al., and Larry V. Geer, et al., and concluded by Mr. Gordon Diesing for Amicus Curiae.

Thereupon, these causes were submitted to the Court on the transcript of the records from the said District Court and the briefs of counsel for the respective parties.

[fol. 684] (Opinion.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 13,124.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,

vs.

Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, Appellees.

No. 13,125.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,

vs.

Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, Appellees.

No. 13,127.

Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, Interveners, Appellants,

vs.

Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, Appellees.

Appeals from the District Court of the United States for the Southern District of Iowa.

September 25, 1946.

Mr. Lyle M. Turner, Special Assistant to the Attorney General, (Mr. Samuel O. Clark, Jr., Assistant Attorney General, Mr. Sewall Key, Mr. A. F. Prescott, Mr. Harold D. Cohen, Special Assistants to the Attorney General, Mr. Maurice F. Donegan, United States Attorney, and Mr. Cloid I. Level, Assistant United States Attorney, with him on the brief) for E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellants.

Mr. Joseph A. Padway, Mr. Robert A. Wilson and Mr. Chauncey A. Weaver submitted brief for Griff Williams, et al., Interveners, Appellants.

Mr. Thomas B. Roberts and Mr. Clyde B. Charlton for Roy Bartels, et al., and Larry V. Geer, et al., Appellees.

Mr. Gordon Diesing (Mr. William J. Hotz, Mr. William F. Dalton, and Messrs. Hotz & Hotz with him on the brief) for Amicus Curiae, Nebraska National Hotel Company.

Before GARDNER, WOODROUGH and JOHNSEN, Circuit Judges.

JOHNSEN, Circuit Judge, delivered the opinion of the Court.

These are appeals by a Collector of Internal Revenue from judgments of a District Court in favor of two ballroom operators[1] for refunds of social security taxes (retirement and unemployment), 26 U.S.C.A. Int. Rev. Code, §§ 1400,[2] 1410, 1600, collected from the operators on the leaders and members of a number of traveling orchestras, which had furnished the music, mostly on single-night en-

[1]One of the ballrooms was located at Dubuque, Iowa, and the other at Fort Dodge, Iowa. They were separately owned and operated. The two suits for refunds were therefore independent, but they were consolidated for trial and also for hearing here.

[2]The ballroom operators had made no deductions from the amounts paid for the services of the orchestras, for employees' shares of taxes, under 26 U.S.C.A. Int. Rev. Code, § 1401, and so had been obliged to pay these portions also out of their own funds to the Collector.

gagements,[3] for some public dances held at the ballrooms during 1941 and 1942. The leaders of the orchestras which had played at one of the ballrooms intervened in that suit to oppose recovery and have also taken an appeal.

The question is whether such a relationship was involved in the engagements as entitled the Commissioner of Internal Revenue to treat the leaders and members of the orchestras as employees of the ballroom operators for social-security-tax purposes. The ballroom operators contended that the relationship between them and the leaders and members of the orchestras had not been that of employer and employee, but that each of the leaders was an independent contractor and that the members of the orchestras were employees of the leaders in the engagements. The District Court adopted this view, 59 F. Supp. 84, and held[4] that the tax authorities had accordingly erred in requiring the ballroom operators to pay social security taxes on the leaders and their orchestra-members.

The engagement in each instance was entered into by a standard-form contract,[5] referred to as "Form B", which the American Federation of Musicians[6] had prepared in 1941 and thereafter required all its members to use. The contract designated the ballroom operator as "employer" and the leader and his orchestra-members as "employees". It contained a recitation that "the employer employs the personal services of the employees, as musicians severally", and a provision that "the employees severally, through

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[3] In the case of one ballroom, the engagements had all been for single nights. In the case of the other, there had been a number of engagements for two or three successive nights. There had also been repeat engagements by some of the orchestras during the period involved.

[4] The case was tried to the court without a jury.

[5] Generally the engagements of the orchestras were made through booking agencies, with the booking agency executing the contract as representative of the leader and members. Some times the leader also signed the contract. Each contract, of course, was executed by the ballroom operator.

[6] The A. F. of M. is a national labor union, of which both the leaders and their musicians were members.

their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of [the regular leader, by whose name the orchestra was known]", in accordance with the terms and conditions of the contract. The place, the date, and the hours of the engagement were specified, together with the price to be paid, which was set out as a lump sum, with the option in some instances to take a fixed percentage of the gross receipts of the dance.

The contract further provided: "The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract."

The Regulations defining employer-employee relationship for social-security-tax purposes, Treasury Regulations 106, § 402.204, Treasury Regulations 107, § 403.204, promulgated under the authority of 26 U.S.C.A. Int. Rev. Code, §§ 1429, 1609, provide: "Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the

work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees. Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case. If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor. * * *"

The Regulations have merely reiterated definitions and tests of the common law for determining master-and-servant and independent-contractor relationships in vicarious tort-liability. Cf. *Singer Manufacturing Co.* v. *Rahn*, 132

U.S. 518, 523, 10 S.Ct. 175, 33 L.Ed. 440; *Casement* v. *Brown*, 148 U.S. 615, 622, 13 S.Ct. 672, 37 L.Ed. 582; Restatement, Agency, § 220.[7]

It will be noted that the "Form B" contract expressly purported to establish the common-law relation of employer and employee between the ballroom operator and the leader and each of his orchestra-members by providing, after designating the ballroom operator as "employer" and the leader and his orchestra-members as "employees", that "The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract." That the purpose of the American Federation of Musicians in adopting the contract form was to shift as nearly as possible the social-security-tax burden previously borne by a leader on his orchestra-members to those engaging the services of the orchestra, and also to bring the leader himself under the benefits of the Social Security Act, is conceded.

Previously, an orchestra assembled and directed by a leader and performing transient engagements for estab-

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[7] Some Circuit Courts of Appeals have declared that the conventional application of these principles governs the liability for social security taxes. *See Radio City Music Hall Corp.* v. *United States*, 2 Cir., 135 F.2d 715, 717; *Texas Co.* v. *Higgins*, 2 Cir., 118 F.2d 636, 638, 639; *McGowan* v. *Lazeroff*, 2 Cir., 148 F.2d 512, 513; *American Oil Co.* v. *Fly*, 5 Cir., 135 F.2d 491, 492, 493; *Glenn* v. *Standard Oil Co.*, 6 Cir., 148 F.2d 51, 53; *United States* v. *Mutual Trucking Co.*, 6 Cir., 141 F.2d 655, 659; *Glenn* v. *Beard*, 6 Cir., 141 F.2d 376, 377; *Spillson* v. *Smith*, 7 Cir., 147 F.2d 727, 728; *Williams* v. *United States*, 7 Cir., 126 F.2d 129, 132; *Indian Refining Co.* v. *Dallman*, 7 Cir., 119 F.2d 417, affirming D.C., 31 F.Supp. 455; *Anglim* v. *Empire Star Mines Co.*, 9 Cir., 129 F.2d 914, 917; *Jones* v. *Goodson*, 10 Cir., 121 F.2d 176, 180. The Supreme Court, however, has made it clear that in social legislation the employer-employee relation is not necessarily a blueprint of common law concepts, but that under any such statute the area between unequivocal employment and unmistakable entrepreneurial enterprise is entitled to be surveyed and platted in practical industrial and economic perspective and with regard for its special remedial purpose. See *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 126, 127, 64 S.Ct. 851, 857, 88 L.Ed. 1170. Cf. also *United States* v. *Vogue, Inc.*, 4 Cir., 145 F.2d 609, 612, 613; *Grace* v. *Magruder*, App. D.C., 148 F.2d 679, 680, 681; *United States* v. *Aberdeen Aerie No. 24 of Fraternal Order of Eagles*, 9 Cir., 148 F.2d 655, 658. House Report No. 728, 76th Cong., 1st Sess., p. 76, had in similar vein declared that "a restrictive view of the employer-employee relationship should not be taken in the administration of the Federal old age and survivors insurance system in making coverage determinations."

lishment owners, such as hotels, clubs, ballrooms, etc., for which the leader or his booking agent entered into the contracts, had been regarded as an entrepreneurial enterprise of the leader. Thus, in *Williams* v. *United States*, 7 Cir., 126 F.2d 129, certiorari denied 317 U.S. 655, 63 S.Ct. 52, 87 L.Ed. 527, such a leader had been held to be an independent contractor and to be liable for the payment of social security taxes on his orchestra-members. *Spillson* v. *Smith*, 7 Cir., 147 F.2d 727, had repeated this view. There had been holdings also by state courts, under state unemployment-insurance statutes, that leaders of orchestras, who directed, hired and fired, and were liable to the individual musicians for their services, were the employers of the orchestra-members, as opposed to the owners of the establishments with whom the engagements were had, even where the engagements had been for extensive periods, the performances had constituted a part of the regular business of the establishment-owner, and the establishment-owner had exercised some measure of control over the execution of the performances. See e.g. *People* v. *Grier*, 53 Cal. App. 2d Supp. 841, 128 P.2d 207; and cf. also *Hill Hotel Co.* v. *Kinney*, 138 Neb. 760, 295 N.W. 397; *Seattle Aerie No. 1 of Fraternal Order of Eagles* v. *Commissioner of Unemployment Compensation*, Wash., 160 P.2d 614.

After the "Form B" contract came into use, however, the Commissioner of Internal Revenue had ruled that an establishment-owner engaging the services of an orchestra under such a contract and receiving performance thereunder was liable as an employer for the payment of social security taxes on the leader and the members of the orchestra, because the contract, as a matter of specific legal obligation, gave him "complete control" of the services of both the leader and the orchestra-members in the performance of the engagement, even though he might not choose to exercise it. See A & C::IT-Mimeograph Coll. No. 5638, R. A. No. 1339, dated February 21, 1944.

The crux of the common-law distinction between an employer-employee relationship and an independent-contractor status is in the right of the person for whom the services are performed to control the person performing them, "not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished" (Treasury Regulations, supra), or in other words "not only to direct what shall be done, but how it shall be done" (*New Orleans, M. & C. R. Co.* v. *Hanning*, 15 Wall. 649, 657, 82 U.S. 649, 657, 21 L.Ed. 220).[8] It is not necessary that the employer actually shall direct the manner in which the services are performed, but "it is sufficient if he has the right to do so" (Treasury Regulations, supra). Cf. *Grace* v. *Magruder*, App. D.C., 148 F.2d 679, 681.

A contract therefore which obligationally gives complete control of the services which one person agrees to perform for another to the person for whom the work is to be done —such as does the contract here—establishes on its face the legal relationship of employer and employee as it existed at common law. The relationship is capable of being changed, of course, by an abrogation of the provision for control, through either an express agreement of the parties or an implied agreement from circumstances

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[8] "A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." Restatement, Agency, § 220(1).

"While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists,—namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of control of the servant's conduct,—the really essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done." 35 Am. Jur., Master and Servant, § 3, p. 445.

"Perhaps one of the most frequently quoted [definitions of independent contractor] is to the effect that an independent contractor is one who, in exercising an independent employment, contracts to do certain work according to his own methods, and without being subject to the control of his employer, except as to the product or result of his work." 27 Am. Jur., Independent Contractors, § 2, p. 481.

demonstrative of a mutual abandonment of it—like any other voluntary modification or rescission, Restatement, Contracts, § 406, Comment b. But obligational provisions in a contract cannot be held to have been so abrogated on equivocal showings. Clear and convincing proof has always been required as a basis for granting a judicial rescission, *United States* v. *Maxwell Land Grant Co.*, 121 U.S. 325, 381, 7 S.Ct. 1015, 30 L.Ed. 949, and the rule is the same as to recognizing an alleged abrogation by the parties themselves, *Peck* v. *Stafford Flour Mills Co.*, 8 Cir., 289 F. 43, 45. Thus, in the latter case, where the action was one for damages in breach and the principal defense was that the contract had been mutually abandoned, this Court said that, while a written contract could be changed or abandoned by parol, the evidence to show such a change or abandonment "must be clear and convincing as to the oral agreement." See also Restatement, Contracts, § 511.

The ballroom operators point out that the action here is by a stranger to the contract and that the limitations of the parol evidence rule therefore do not apply.[9] That, of course, is true, but it does not assist in solving the real question in the situation. Exemption from the parol evidence rule simply gave the ballroom operators the right to contradict the terms or obligations of the written contract. It left them free to prove by parol, if the facts so were, that instead of the agreement having been that the legal right of control of the leader's and orchestra-members' services should be given to the ballroom operators, the agreement actually was that it should remain in the leader, or that the parties had never in fact undertaken to agree as to who should have the legal right of control.

[9] Though the point is of no importance here, Williston's critical observation may be noted in passing, that the cases in which the stranger-to-the-contract exemption from the parol evidence rule has been applied have involved mostly contradictions of recited facts or proof of fraud against the rights of third persons, rather than contradictions of express obligations of the instrument. 3 Williston on Contracts, Rev. Ed. § 647, p. 1869. See also 9 Wigmore on Evidence, 3rd Ed., § 2446, p. 149.

The evidence, however, in our opinion, fails to establish either of these situations in relation to the negotiation and execution of the contract. To the contrary it shows that, when the "Form B" contract initially was presented to the ballroom operators in engaging the services of an orchestra, they had objected to the provision giving them the legal right of control and making them employers, until they were told that this was the only basis on which they could obtain the services of the orchestra, and that they thereupon executed the contract and each of the other contracts thereafter and accepted the services of the various orchestras under them. On these facts we think it must be held that the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members and so had created the common-law relation of employer and employee between them, at the time the contracts were executed at least. This then would make the question whether the provision for legal right of control could, on proper standards, be said to have been thereafter abrogated so as to have changed the created relationship.

The District Court fell into the error of refusing to recognize the contract as having legally created the relationship of employer and employee at the time of its execution and then undertaking to determine simply whether the evidence showed a subsequent abrogation of that relationship by the parties. It treated the provision for control as if it never had been an obligation of the contract but only a recital or description in the instrument[10] and so

[10]Specific obligations in a contract legally definitive of a created relationship cannot be dealt with on the same level as general recitals or descriptions which the other circumstances of the situation show to be meaningless or of only slight implication. The most common instance of such a recital or description in a contract for services is where it is attempted to term the relationship as other than one of employer and employee, such as by describing the workman as an independent contractor or by a recital that "Nothing contained herein shall be construed to create the relationship of employer and employee." Courts do not hesitate to ignore such recitals or

merely "an element that may be considered by the fact finder [illegible] any assistance in determin[illegible] what is the true relationship." 59 F.Supp. at page 88. It then held that the provision for control was not "of any assistance" as "an element", because "the contract was not entered into by fair negotiations between the parties, but upon demand of the musician's union and the requirement that it must be signed or no orchestra could be obtained", and for the further reason that the provision was in any event meaningless because the control could never be exercised. "If the owner attempted to exercise any such right of taking charge and control of the orchestra it would destroy the orchestra and the result of a satisfactory entertainment. It just could not be done." 59 F. Supp. at pages 88, 89. Finally, the Court said that the whole thing could be ignored also as constituting merely "an anticipatory arrangement to escape taxation."

A court of law cannot ignore a contract because of alleged unfairness in the negotiations by which the obligation has been created, unless the unfairness amounts to duress or fraud capable of avoiding the contract. Duress or fraud has not been set up here, nor has either of them been attempted to be proved. Mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract or a court to ignore it. The balancing of bargaining power between economic classes is of the legislative and not the judicial domain. The fact that the ballroom operators here had objected to the provision for control, but were obliged to accept it in

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descriptions which are inconsistent with the other equally important general circumstances of the situation. For examples of such cases, see *Matcovich* v. *Anglim*, 9 Cir., 134 F.2d 834; *McDermott* v. *Henricksen*, D. C. Wash., 45 F.Supp. 277; *Industrial Commission* v. *Northwestern Mutual Life Ins. Co.*, 93 Colo. 550, 88 P.2d 560. In the same manner, an artificial designation of an independent contractor as an employee was ignored in *Williams* v. *Smith*, 7 Cir., 126 F.2d 129. These cases, however, do not warrant the similar ignoring of express obligations in a contract in favor of extraneous circumstances.

order to obtain the services of the orchestras, to our mind only serves to emphasize the reality of the making of the agreement.

The view that the provision for control could be ignored as being unexercisable and hence meaningless is also legally untenable. It is equivalent to saying that the leaders and members of organized orchestras are unable legally to become employees of those for whom they perform engagements. Whatever may be the consequence to the reputation of an orchestra in obtaining other engagements or to the quality of the performance to be rendered under an immediate contract, the control of the orchestra's services certainly is capable of being so vested legally in the operator of a hotel, club, ballroom, or other establishment, as to permit of the creation of an employer-employee relationship. It matters not legally whether the hotel manager, club president, or ballroom operator has the capacity, desire, or intention to meddle into the technique of the musical performance. That is not the test or the essence of the creation of the legal right of control for which the contracts here provide. The legal scope of the right in the present situation is unqualifiedly clear—"complete control". The extent to which ballroom operators might deem it practical in their own interest to exercise the right could well vary, but that aspect is not of legal importance, and one instance from the record will serve to illustrate generally that as a matter of fact the right here did have not merely a legal but a practical reality as well. In one of the engagements in suit the orchestra appeared without its regular piano player and the ballroom operator exercised the prerogative of selecting and requiring the leader to use a certain local musician for the performance.

The view that the provision for control could be ignored as an improper scheme or device on the part of the leaders

to escape taxes equally has no validity in the situation. In the first place, the contract does not operate to deprive the Government of any taxes which it otherwise would have received. Next, if the legal relationship of employer and employee was created between the ballroom operators and the orchestra-members, as it was here in the circumstances of the negotiation and execution of the contract, and that relationship had not thereafter been abrogated, the ballroom operators were simply bearing the burden of the taxes which the statute imposes upon any one who occupies an employer's status. That it was the purpose of the orchestra-leaders to rid themselves of taxes by creating an employer-employee relationship with the ballroom operators can hardly constitute a shield to the ballroom operators, if such an employment relationship legally was created and legally continued to exist. Nor are the ballroom operators able to escape the taxes arising out of the engagements because the leaders may be liable for social security taxes on their orchestra-members in their relations outside such engagements.[11] Clearly, a person can be an independent contractor in one part of his activity and an employee in another. Cf. *Cowles* v. *J. C. Mardis Co.*, 192 Ia. 890, 181 N. W. 872. And, even if the general relationship of a leader to his orchestra-members outside the specific engagements was such that the Commissioner of Internal Revenue could have insisted that the leader should pay social security taxes on his orchestra-members all the way down the line and that the brief legal relationships of employer and employee created with the ballroom operators would be ignored for practical purposes of the Treasury in collection or handling or for other reason, this would not help the ballroom operators here. The Government not infrequently has the right to choose between legal and practical

[11] The record indicates that the leaders generally had agreed to pay or guaranteed each orchestra-member a certain amount weekly and that if the sums payable to the members from the specific engagements during such a period did not equal this amount the leaders made good the difference out of their own pockets.

situations in tax matters, *Higgins* v. *Smith*, 308 U.S. 473, 476, 477, 60 S. Ct. 355, 84 L.Ed. 406, but the right to make the choice in such an alternative situation is the Commissioner's, and a taxpayer who has a legal liability for the tax cannot complain of the choice. Courts are concerned only with the legality of what is done in matters of taxation and not with the wisdom or policy of the action.

The ballroom operators have made some arguments why the provision for control was entitled to be ignored, with which the District Court apparently felt it unnecessary to deal in view of the conclusion which it had reached. Principally, they call attention to the fact that the "Form B" contract contained a clause that "It is agreed that all the rules, laws and regulations of the American Federation of Musicians * * * are made part of this contract"; that the by-laws of the Federation in force at the time the "Form B" contract was adopted by its executive board and put into effect by order of its president contained provisions referring to the leaders as employers or contractors and to the orchestra members as employees of the leaders and declaring that "Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished * * *"; and that these provisions of the by-laws were not formally repealed or changed until some time after the engagements that are here involved. There was, however, another provision in the by-laws giving the president of the Federation the power "to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members * * *; any such order may by its terms * * * annul and set aside [the Constitution, By-Laws, Standing Resolutions, or other laws,

resolutions or rules of the Federation] or any portion thereof * * * and substitute therefor other and different provisions of his own making; the power so to do is hereby made absolute in the President * * *".

While the order of the president requiring the use of the "Form B" contract in all engagements thereafter made did not in express terms annul or set aside any of these by-laws, there can hardly soundly be any doubt that his edict that "This contract and none other must be used on all such engagements on and after June 1, 1941" and "Any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for said violation" sufficiently required, under the absolute powers vested in him,[12] that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with the relationship attempted to be created by the provision for control in the "Form B" contract.

The provision for control cannot therefore be ignored on the basis of this argument of the ballroom operators. The other minor arguments made why the contract provision could be ignored do not require discussion.

This leaves then as the only remaining question whether the provision for control could be said to have been subsequently abrogated, so as to have changed the employer-employee relationship which had been created at the time the contract was negotiated and executed. The District Court, as we have indicated, erroneously treated the situation as if the provision for control had not created the relationship of employer and employee at the time the contract was executed and that the question therefore simply was one of determining the legal relationship on the basis of the general circumstances and the facts of performance—the

[12] With the question whether the union could be regarded as being democratic in the light of its president's absolute powers, we are, of course, not here concerned.

same as if no obligation covering the right of control had been contained in the contract. It accordingly declared that, since the leader had exercised control over the performance and the ballroom operator had not, this "is sufficient to warrant a finding of the [leader's] right of actual control." 59 F.Supp. at page 89. It regarded as of weight also the leader's part in organizing the orchestra, his efforts generally to create a reputation for the orchestra under his own name, his relation with his musicians outside the contract-engagements, the fact that the ballroom operator was not required to furnish the musical instruments for the performance, and other such extraneous facts, which ordinarily are of assistance in determining whether an employer-employee relationship or an independent contractor status exists, where there is no express contractual obligation covering the right of control.

But these facts, while perhaps ordinarily sufficient to support a finding as to where the right of control resides, when it has not been obligationally fixed by the contract, cannot in our opinion be declared to constitute clear and convincing evidence that there has been an abrogation of the obligation for control and that the relationship of employer and employee created by the negotiation and execution of the contract has been changed. The fact that an employee has been left to perform his tasks without direction, where no conversations or other incidents between the parties are shown to have occurred subsequent to the creation of the employer-employee relationship, is hardly satisfying proof of a mutual change in the contract, for it involves no inconsistency with the continued existence of the employer's right to control if he chooses to exercise it. And such extraneous facts, as that the person agreeing to perform the services normally is engaged in a distinct occupation or business, that the work to be done is a matter of special skill not usually performed under the supervision of the person for whom such services are rendered, that the workman is expected to furnish his own tools and

instrumentalities, and other elements of that nature, which may be of value in throwing light on the intended relationship where the right of control is not contractually clear, can hardly be of much weight, or relevance even, in establishing that there had been a subsequent abrogation of the provision for control in the present case, since these are facts which had existence and were known to the parties at the time the contract was made and to which they manifestly chose to give no significance in obligationally fixing the power of control to create an employer-employee relationship for the particular engagements.

In summary, the relationship of employer and employee legally was created between the ballroom operators and the leaders and orchestra-members by the negotiation and execution of the obligation which gave the ballroom operators the right of complete control over the services, and it has not been shown by clear and convincing evidence that the right of control mutually was abrogated so as to have changed the employment relationship.

The judgments are accordingly reversed and the causes remanded.

GARDNER, Circuit Judge, dissenting.

I think the judgments should be affirmed. The basic facts are not in dispute. The actions were tried to the court without a jury and the trial court on consideration of the evidence entered findings as follows:

"I. That at all times, and during the times of the performance by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work. Such leader exercised and had the exclusive right to hire and fire such members, to con-

tract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances. Such leader organized, managed and controlled such orchestras as an independent organization for hire, and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes.

"2. The contract, Form B, was not entered into by fair negotiation between the parties, but upon demand of the musician's union and the leaders of the orchestras that it must be entered into or no orchestra could be obtained, and it was required to be so executed with the avowed purpose of protecting the leader from taxes as an employer. It was required by the leader to be entered into as an anticipatory arrangement to escape taxation. There was no difference in the conduct and control the orchestras, or the right to so conduct and control such orchestras, subsequent to June, 1941, or by reason of the Form B contract, than there was before that time, and the true relationship at all times as between the plaintiffs and such leaders was that the latter were independent contractors.

"3. At the time of the execution of the contracts, Form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestras or any of the sidemen or the method or manner of doing its or their work in any particular.

"4. Considering all the facts and circumstances as disclosed by the evidence, including the contract Form B and its execution, none of the plaintiffs was at the time of the performance of the several orchestras on their premises the employer of the leader or of any of the members of the orchestras within the meaning of the Internal Revenue Statutes."

See *Bartels* v. *Birmingham*, 59 F. Supp. 84.

It was within the province of the trial court to draw such inferences from the basic facts and circumstances as were reasonably deducible. In effect the court found that the contract did not represent the true relationship of the parties; that it was not entered into by fair negotiations; that the right to control as well as the actual control was intended to be retained and was retained by the leaders and that the orchestras as independent organizations for hire were inherently incapable of being controlled by the ball-room owners. Judge Donohoe reached substantially the same conclusion in *Nebraska National Hotel Co.* v. *O'Malley*, 63 F.Supp. 26. Having so found, the trial court in the instant case concluded that the leaders were independent contractors and that they rather than the ball-room owners were the employers of the musicians or sidemen. The findings of the court are presumptively correct and are not to be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge of the credibility of the witnesses, and hence, the weight to be given their testimony. Rule 52 (a), Rules of Civil Procedure. A finding of fact is clearly erroneous only when it is not supported by substantial evidence, or is arrived at by the application of a wrong principle of law. *Sears, Roebuck & Co. v. Talge*, 8 Cir., 140 F.2d 395. We have held that substantial evidence is such " 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Archer* v. *Securities & Exchange Commission*, 8 Cir., 133 F.2d 795. In determining whether there is substantial evidence to support the findings of the trial court, this court should consider the evidence most favorably to the party prevailing (*United States* v. *Perry*, 8 Cir., 55 F.2d 819), and when different conclusions may reasonably be drawn from the evidence, the question as to which inference should be drawn is for the trial court and not for the appellate court. *Luzier's Inc.* v. *Nee*, 8 Cir., 106 F.2d 130; *Brooks*

v. *Willcuts*, 8 Cir., 78 F.2d 270. Even where the evidence is undisputed, if different conclusions may reasonably be drawn a question of fact is presented. *F. T. Dooley Lbr. Co.* v. *United States*, 8 Cir., 63 F.2d 284. It is conceded by the majority opinion that,

"Previously, an orchestra assembled and directed by a leader and performing transient engagements for establishment-owners, such as hotels, clubs, ballrooms, etc., for which the leader or his booking agent entered into the contracts, had been regarded as an entrepreneurial enterprise of the leader. Thus, in *Williams* v. *United States*, 7 Cir., 126 F.2d 129, certiorari denied 317 U.S. 655, 63 S.Ct. 52, 87 L.Ed. 527, such a leader had been held to be an independent contractor and to be liable for the payment of social security taxes on his orchestra-members."

It is also conceded that there had been holdings by the State Courts that leaders of orchestras who directed, hired and fired, and were liable to the individual musicians for their services, were the employers of the orchestra members. It is therefore clear that the majority opinion is bottomed entirely upon the Form B contract entered into between the orchestra leaders and the ball-room owners. The government, to be sure, was not a party to this contract, and if it did not in fact create or change the relationship of the parties it should not be of controlling effect. The trial court took it into consideration together with all the evidence and circumstances and found that it did not change the relationship of the parties as it had theretofore existed, and that the orchestra leaders were the employers of the musicians, and were independent contractors so far as the ball-room owners were concerned. None of the sidemen or musicians, aside from the leaders, executed any of the contracts, and the contract terms designating or giving appellation to a relationship in form created by them, are not in any sense conclusive. Parties can not by the use of legal terms make impotent the legislative arm of the government. The actual facts, not the names or terminology,

employed, must govern. *Doll* v. *Commissioner*, 8 Cir., 149 F.2d 239; *Spillson* v. *Smith*, 7 Cir., 147 F.2d 727; *Matcovich* v. *Anglim*, 9 Cir., 134 F.2d 834; *Industrial Commissioner* v. *Northwestern Mutual Life Ins. Co.*, Colo., 88 Pac. 2nd, 560; *Jack and Jill, Inc.* v. *Tone*, Conn. 9 Atl. 2d 497; *Bertino* v. *Marion Steam Shovel Co.*, 8 Cir., 64 F.2d 409; *Gulf Refining Co.* v. *Brown*, 4 Cir., 93 F.2d 870; *Sanford* v. *Goodridge*, Ia., 13 N.W. 2d 40; *Gilemli* v. *Netherland Dairy Co.*, N.Y., 171 N.E. 906; *Nestle's Food Co.* v. *Industrial Commission*, Wis., 237 N.W. 117; *In re Morton*, N. Y., 30 N.E.2d 369; *Griffiths* v. *Commissioner*, 308 U.S. 355; *Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436. This principle or rule is particularly pertinent in tax matters. Taxation is a practical matter dealing with realities and the power of taxation is not to be restricted by mere legal fictions, but substance rather than form controls in applying tax laws. *Ruben* v. *Commissioner*, 8 Cir., 97 F.2d 926; *Helvering* v. *Tetzlaff*, 8 Cir., 141 F.2d 8; *Paschal* v. *Blieden*, 8 Cir., 127 F.2d 398; *Weiss* v. *Stearn*, 265 U.S. 242.

Congress imposed a social security tax upon employers and any contractual devices seeking to shift that tax from the class designated by Congress must at least be subjected to scrutiny to determine whether the law is being circumvented. Thus, words contained in a contract providing that nothing in it should be construed to create the relation of employer and employee, have been held to be only "a slight element in assisting the court in a determination of the term 'employment'." *Industrial Commission* v. *Northwestern Mutual Life Ins. Co.*, Colo., 88 Pac. 2nd 560. In *Willard Sugar Co.* v. *Gentsch*, Ohio, 59 F.Supp. 82, Judge Freed said:

"The written contract in evidence, in which it is specifically recited that the plaintiff shall exercise no control or supervision over Kolb except as to the results of his work;

and the printed contract between Kolb and the plaintiff furnished on the required form to the Public Utilities Commission of Ohio, in which there is an assertion that Kolb is an independent contractor, constitutes some evidence as to the relationship between Kolb and the plaintiff.

"These recitals or written provisions in the contracts, however, are not convincing. It is entirely unimportant what designation or terminology was used in these written instruments to denote the relationship of the parties, when the evidence persuasively shows that the relationship was that of employer and employee and not of contractor and contractee."

The Collector in his brief states,

"We agree with the District Court that actual control was seldom, if ever, exercised by the taxpayer personally and we agree also that by the very nature of the services of professional musicians, who work together as a group, their performances are usually directed by the leader."

It is insisted, however, that the "requisite right of control" could be placed in the ball-room operators if the parties so agree, and in effect make the orchestra leaders foremen of a group to conduct them in the performance of certain services. This view seems to form the basis for the conclusion reached by the majority opinion. It is stated in the opinion that,

"It is not necessary that the employer actually shall direct the manner in which the services are performed, but 'it is sufficient if he has the right to do so' (Treasury Regulations, supra)."

This reasoning overlooks the fact that the court found that the contract not only did not create the relationship of employer and employee, but was not intended so to do; that such relation did not in fact exist and that the so-called contract was a mere subterfuge by which it was sought to shift the burden of tax from that class designated by the Act of

Congress to others not so designated. This in fact was the sole purpose of this formal contract. As said by this court, speaking through Judge Stone, in *Doll* v. *Commissioner of Internal Revenue, supra,*

"We have here a written instrument which is sufficient to create a partnership, both at common law and under Missouri decisions. *Schneider* v. *Schneider,* 347 Mo. 102, 146 S.W. 2d 584; *Stone* v. *Guth,* 232 Mo. App. 217, 102 S.W. 2d 738. The judgment here is at most an adjudication of what was never in doubt. The existence of such a contract is not determinative of this tax issue. There remains the impact of the test of an analysis of 'all the circumstances attendant on its creation and operation'."

It is important to bear in mind that the government is not a party to this contract and the court has found on abundant evidence that it was entered into for the purpose of creating an appearance, not of creating a reality. The mere fact that there may be an abstract legal right of control as between the parties is not material because all the circumstances show that this abstract right was a mere subterfuge or fiction by which to avoid the act of Congress by shifting the tax from those intended by Congress to be subjected thereto. The evidence, including the attending circumstances, abundantly sustained the court in finding that the contract provision was intended to conceal the real relation of the parties as it was recognized by them and found by the trial court. We have in principle condemned such an instrument even as between the parties. Thus, in *Burroughs Adding Machine Co.* v. *Bogdon,* 8 Cir., 9 F.2d 54, it is said:

"The instrument is obviously intended to convey the impression that it is a lease. It is designated 'a machine lease' and the words 'lease,' 'lessor,' 'lessee,' 'rentals,' and 'rent' are frequently employed therein. While the use of these terms has an undoubted weight in determining the character of the instrument, it is not controlling."

Again, in *E. C. Warner Co.* v. *W. B. Foshay Co.*, 8 Cir., 57 F.2d 656, we said:

"So far as the form of the transaction is concerned, no usury is disclosed. Courts, however, are not bound by what the parties represent themselves to be doing, but will look beyond the mere form of the transaction to its substance. Usury is a moral taint, and no subterfuge, however cunningly devised, will be permitted to conceal it. If it appears that the transaction as disclosed by the testimony and the surrounding facts and circumstances was in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, then, regardless of the forms or devices resorted to to conceal the character of the transaction, the parties thereto are subject to the consequences provided by the usury statutes."

Even a deed of warranty will be held to be a mortgage if in fact given to secure an obligation.

The facts and circumstances which seem to me abundantly to sustain the court's finding may be briefly referred to. The leaders of the orchestras were dependent for patronage upon a reputation for playing dance music in a distinctive style. These leaders selected the musicians, the instruments, and the musical arrangements. They trained the musicians and rehearsed the musical selections for the purpose of performing this distinctive style. In playing engagements—usually single evening performances—the leader led and directed the musicians so as to make certain that the production was of the type the public identified as his. The name of the leader was extensively advertised. The ball-room operator relied upon the orchestra leader to bring to his ball-room an organization capable of performing in a satisfactory manner and in the distinctive style recognized as belonging to that organization. The musicians or sidemen were selected and hired by the leader and were discharged by him. The ball-room operators never hired nor discharged any sidemen and they never had any conversation with the leader or sidemen about

discharges. Salaries and wages of the sidemen and length of the terms of their employment were agreed upon by the leader when he made his arrangements with the sidemen and this was all done long before any appearance at the ball-rooms of the appellees. The compensation of the sidemen was usually a flat weekly rate which the leader was bound to pay regardless of whether or not the orchestra played engagements. Some leaders kept a regular payroll, showing the names of the sidemen and the amounts of their compensation. Appellees did not even know the amount of compensation paid the sidemen, nor the manner of payment. Indeed they had nothing whatever to do with determining the amount. Appellees paid a gross contract price for each engagement, which was determined through negotiations between them and the leader or the booking agent. The performance price was paid to the leader or his booking agent, never to the sidemen. Profits, after expenses were paid, belonged to the leader. If a loss resulted, he bore it. In the performance of his engagement each leader dictated such matters as the style of music, its length, tempo and volume. He owned the musical library of sheet music which was used by the orchestra, and designated the various selections to be played therefrom; determined the number of sidemen, prescribed and furnished the form of attire worn by the sidemen, provided the music racks and public address system, provided or arranged for the means of transportation to and from the particular engagement, determined the placing of the musicians on the bandstand or rostrum, conducted rehearsals prior to the engagement, and planned and directed the presentation of any featured numbers.

There is no evidence that appellees ever gave any directions or instructions to the leader or sidemen of any orchestra, or ever offered or assumed the right so to do. There is evidence that a leader might ask what patrons liked and the answer might be to mix them up, not to play all

waltzes. This, however, is a far cry from control. It indicates rather that the bandleader wanted advice as to what a particular group might want played. At most it showed cooperation. There was testimony that the operators told the leaders when to take intermissions. This is certainly unimportant and not inconsistent with the finding that the leaders were independent contractors, especially when considered with the mass of testimony going to show that the actual control and operation of the orchestra were in the leader. The trial court surely might reasonably have concluded that an independent contractor might in many things defer to the judgment of one who engaged him and in whose place he was performing. Even this meager testimony as to actual control was denied and the finding of the trial court should be conclusive on that question. Sidemen were often paid by a check on the leader's account in the bank. Leaders of the orchestras testified that there was no difference or change in their operation after the Form B contract was in effect and prior thereto, in performing in appellees' ball-rooms.

The quality of the music produced by these orchestras depended primarily on the ability of the individual musicians, the instrumentation, the selections played, and the skill of leadership. All these matters rested within the leader. The appellees were not skilled musicians and the testimony is uncontradicted that they never had anything to do with hiring or firing the personnel of the orchestra.

The evidence is clear and convincing that the leaders exercised complete control of the means and manner of performance. They and they alone had the right to hire and fire; they and they alone determined the wages of the sidemen; and they and they alone actually paid the sidemen. The leaders were conducting an enterprise for profit, building up a name and reputation for themselves

and their orchestras. The findings of the trial court that the leaders were in fact the employers is sustained not only by substantial evidence but by convincing proof. In fact, a finding that the contract correctly reflected the relationship of the parties would, I think, find no support in the evidence. No case could more convincingly illustrate an agreement which purported to create a certain relationship while the actual conduct and operation of the parties established another. At most the contract was simply a circumstance to be considered in determining the relationship of the parties. It was not exclusive, and as said by the Circuit Court of Appeals of the Fourth Circuit, in *Gulf Refining Co.* v. *Brown*, 93 F.2d 870,

> "It is only by consideration of all of the facts pertaining to the relationship in any case, including the provisions of the contract, the actual conduct of the parties, and the conditions of the business in which they are engaged, that it can be determined whether the distributor is endowed with that control over his own methods and means of doing the work which is the test of an independent contractor."

What Congress has commanded to be taxed must be taxed. Here the statute taxes employment and nothing else. Both the Commissioner and the taxpayer are subject to the statute and can not by adopting a fiction of the parties shift the burden of tax from those upon whom Congress has placed it.

The majority opinion brushes aside the findings of the trial court and bases its conclusion upon the single fact that there was in form a contract which purported to fix the relationship of the parties. This, I think, is not warranted. The findings of the court being sustained by abundant evidence, the judgments appealed from should be affirmed.

[fol. 713] (Judgment in Causes Nos. 13,124 and 13,127.)

United States Circuit Court of Appeals

Eighth Circuit.

September Term, 1946.

Wednesday, September 25, 1946.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the States of Iowa, Appellant,
No. 13,124. vs.
Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom.

Appeal from the District Court of the United States for the Southern District of Iowa.

and

Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, Interveners, Appellants,
No. 13,127. vs.
Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon d/b/a Crystal Ballroom.

Appeal from the District Court of the United States for the Southern District of Iowa.

These Causes came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in these causes (No. 294 in the District Court), be, and the same is hereby, reversed with costs.

[fol. 714] It is further Ordered by this Court that the Interveners, Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, have and recover against Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, the sum of Seven Hundred Seventeen and 29/100 ($717.29) Dollars, being the amount of Clerk's general fees incurred by said Interven

ers in this Court $27.20, the amount paid for one-half of Clerk's fees for preparing record for the printer and supervising the printing of the record $83.13, and the amount paid for one-half of the cost of printing the record $606.96, and have execution for said total sum of $717.29.

It is further Ordered by this Court that Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d/b/a Crystal Ballroom, pay to the Clerk of the District Court the sum of Twenty and 87/100 ($20.87) Dollars, being one-half of the Clerk's general fees incurred by E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, in this Court. Said sum of $20.87 to be collected by the Clerk of the District Court according to law and by him paid over to the Clerk of this Court for proper accounting thereof.

And it is further Ordered by this Court that these causes be and the same are hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court filed herein.

September 25, 1946.

[fol. 715] (Judgment in Cause No. 13,125.)

United States Circuit Court of Appeals
Eighth Circuit

September Term, 1946.

Wednesday, September 25, 1946.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,
No. 13,125. vs.
Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms.

Appeal from the District Court of the United States for the Southern District of Iowa.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause (No. 328 in the District Court), be, and the same is hereby, reversed with costs.

It is further Ordered by this Court that E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, have and recover against Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, the sum of Six Hundred Six and 96/100 ($606.96) Dollars, being the amount paid the printer for one-half the cost of printing the record from the District Court, and have execution therefor.

[fol. 716] It is further Ordered by this Court that Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, pay to the Clerk of the District Court the sum of One Hundred Four ($104.00) Dollars, being one-half of the Clerk's fee for preparing the record for the printer and supervising the printing thereof incurred by E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa $83.12, and one-half of the Clerk's general fees incurred by E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, in this Court $20.88. Said sum of $104.00 to be collected by the Clerk of the District Court according to law, and by him paid over to the Clerk of this Court for proper accounting thereof.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court filed herein.

September 25, 1946.

[fol. 717] (Motion of Appellees to Stay Issuance of Mandates in Causes Nos. 13,124, 13,125 and 13,127.)

In the United States Circuit Court of Appeals
for the Eighth Circuit.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,
No. 13,124. vs.
Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, Appellees.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,
No. 13,125. vs.
Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, Appellees.

Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, Intervenors, Appellants,
No. 13,127. vs.
Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, Appellees.

[fol. 718] Comes now the Appellees in the above entitled causes and shows unto the Court as follows:

That on September 25, 1946 an opinion and judgment of this Court was entered in these cases reversing the judgments appealed from and remanding the causes to the District Court of the United States for the Southern District of Iowa.

That it is the purpose of the Appellees to make timely petition to the Supreme Court of the United States for a writ of certiorari to be directed to this Court to the end that the decision and judgment of this Court in these causes may be reversed by the Supreme Court of the United States.

Wherefore, Appellees move the Court to enter an order herein directing the Clerk to withhold the mandate of this Court in these causes for a period of thirty (30) days from October 11, 1946.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
Attorneys for Appellees,
4th Floor, Empire Building,
Des Moines, Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals on Oct. 7, 1946.

[fol. 719] (Order Staying Issuance of Mandates in Nos. 13,124, 13,125 and 13,127.)

September Term, 1946.

Monday, October 14, 1946.

On Consideration of the motion of appellees for a stay of the mandates in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandates herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

October 14, 1946.

[fol. 720] (Clerk's Certificate.)

United States Circuit Court of Appeals
Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of two volumes, Volume I consisting of pages a to 380, inclusive, and Volume II consisting of pages 381 to 719, inclusive, contains the transcript of the records from the District Court of the United States for the Southern District of Iowa as prepared and printed, pursuant to designation and stipulation, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerks, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein E. H. Birmingham, Individually and as Collector of Internal

Revenue for the State of Iowa, was Appellant and Roy Bartels, et al., were Appellees, No. 13,124, E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, was Appellant and Larry V. Geer, et al., were Appellees, No. 13,125, and Griff Williams, et al., were Appellants and Roy Bartels, et al., were Appellees No. 13,127, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 30th day of October, A. D. 1946.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

[fol. 721] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 731

ORDER ALLOWING CERTIORARI—Filed January 6, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 722] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 732

ORDER ALLOWING CERTIORARI—Filed January 6, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 29 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 731

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS, RESPONDENTS

No. 732

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CLYDE B. CHARLTON,
THOMAS B. ROBERTS,
Attorneys for Petitioners.

GEORGE E. BRAMMER,
JOSEPH I. BRODY,
LOUIS A. PARKER,
of Counsel.

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I. The majority opinion and decision of the Circuit Court of Appeals is in error in holding that a written contract which purports to vest the right of control over the services in one of the parties conclusively establishes a relationship of employer and employee and precludes consideration of facts which clearly prove a relationship different than that purported to be created by such contract 30

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS, RESPONDENTS

No. .....

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, members of a co-partnership doing business as Crystal Ballroom, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered on Sep-

tember 25, 1946, in the cases numbered and entitled on its docket, No. 13124, E. H. Birmingham, etc., Appellant, v. Roy Bartels, et al, Appellees, and No. 13127, Griff Williams, et al, Appellants, v. Roy Bartels, et al, Appellees; and Larry V. Geer and Margaret Geer, members of a co-partnership doing business as Larry Geer Ballrooms, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered on September 25, 1946, in the case numbered and entitled on its docket, No. 13125, E. H. Birmingham, etc., Appellant, v. Larry V. Geer, et al, Appellees, which judgments reversed a decision of the District Court of the United States for the Southern District of Iowa and remanded the causes for further proceedings in conformity with its opinion.

OPINIONS BELOW.

The opinion of the District Court (R. 654-662) is reported in 59 F. Supp. 84. The majority opinion of the Circuit Court of Appeals (R. 682-698) is reported in 157 F. 2d 295 and the dissenting opinion of Circuit Judge Gardner (R. 698-709) is reported in 157 F. 2d 305.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

These actions were brought in the United States Court for the Southern District of Iowa by petitioners for refunds of social security and employment taxes with respect to the services of eleven orchestras which furnished music for public dances held at petitioners' ballrooms during the years 1940, 1941 and 1942. The cases were consolidated for trial in the district court (R. 48) and for hearing of the appeals in the Circuit Court of Appeals. (R. 675)

The leaders of the six orchestras involved in the *Bartels*

case intervened in that action. (R. 20-36) Griff Williams, one of the interveners, is the same Griff Williams whose orchestra was involved in a case of *Williams v. United States*, 126 F. 2d, 129 (C.C.A. 7th, 1942), certiorari denied, 317 U.S. 655; 63 S. Ct. 52, 87 L. Ed. 527 (R. 329), wherein Williams, and not the establishments at which his orchestra played engagements, was held to be the employer of the members of his orchestra for social security tax purposes.

The leaders of the orchestras involved in the *Geer* case did not intervene in that action. Their names are Al Menke, Les Hartman, Jimmy Barnett, Paul Moorhead, Blue Barron and "Doc" Lawson. (R. 289, 290)

The evidence upon the trial disclosed that the orchestras were traveling orchestras which the ballroom proprietors secured through negotiations with either booking agents or the leaders. (R. 312, 313) No negotiations were had with the members of the orchestra (R. 52, 312), known in the trade as "sidemen." (R. 448) These traveling orchestras usually held forth in single evening performances in what are known as "one night stands." (R. 331)

Each of the orchestras was organized and established as a permanent enterprise many years prior to its engagement for petitioners. (R. 70, 71, 132, 162, 259, 311 and 329) Each leader conducted his orchestra as an independent business and held himself out to the public as ready, able and willing to serve anyone who might desire engagements. (R. 126, 127, 259, 330 and 331) The name of each leader and his orchestra and his particular style of music was extensively advertised either by the leader or his booking agent. (R. 134, 259, 312, 339-341, Pltfs.' Ex. B-25, R. 261 and 260, Pltfs.' Ex. C, R. 403-414, 338) Each orchestra operated over a wide territory in which it was well known, having played engagements therein for various ballrooms, hotels, amusement parks, clubs, lodges, city fire and police departments, American

Legion Posts, fairs, college groups, high school classes and civic organizations. (R. 71, 127, 162, 163, 259, 265, 330, 331 and 442)

The services of each orchestra consisted of the playing of popular dance music in a distinctive style, as developed and determined by the leader in order that his name and the name of his orchestra might acquire and maintain a reputation and receive public approval and acceptance throughout the territory in which it played. (R. 73, 74, 131, 165, 253, 271, 281) The leader in the case of each orchestra selected the musicians, instrumentation and musical arrangements which he thought would enable the orchestra to produce, under his direction, the particular style of music he had in mind. (R. 131, 165, 271, 352) He trained and rehearsed the sidemen for the purpose of accomplishing this result, and in the playing of an actual engagement he led and directed them in the manner of their performance so as to make sure that they played the distinctive style of music by which the leader and his orchestra had become identified in the minds of the public. (R. 131, 132, 165, 276, 352, 353)

Prior to engaging each of the orchestras, petitioners were familiar with the reputation and special quality of music of each leader's orchestra. (R. 53, 54, 74, 312) In each instance petitioners relied on the leader of the orchestra to bring to their respective ballrooms an established organization composed of musicians selected and rehearsed by him and capable of performing the orchestra's distinctive style of music with which petitioners were familiar. The reputation and public acceptance of such "Name Bands" were the things which caused petitioners to agree to pay the price for the engagement demanded by the leader or his booking agent. (R. 54, 74, 313)

The sidemen of the orchestras were selected and hired by the leaders (R. 131, 132, 164, 270, 346, 347) and were dis-

charged by the leaders. (R. 133, 161, 271, 349) Petitioners never hired or discharged any sideman of any of the orchestras and never had any conversation with any leader or sideman about hiring or discharging the latter. (R. 66, 73, 326, 327) Nor did petitioners believe that they had the right to discharge any sideman. (R. 66, 67)

The salary or wages of each sideman of an orchestra, the length and terms of his employment, were fixed and determined by the leader at the time he made his hiring arrangement with such sideman (R. 136, 164, 272, 281, 346, 347), which was months and even years prior to the orchestra's engagement at petitioners' ballroom. (R. 132, 163, 270, 348, 349) Usually the compensation which the leader agreed to pay his sidemen was a flat weekly salary (R. 136, 158, 168, 272, 326) which the leader was bound to pay regardless of whether the orchestra played engagements. (R. 136, 151, 152, 272) Some of the leaders kept a written payroll record showing the names of the sidemen and the amounts of their weekly salary. (R. 137, 168, 281, and Pltfs.' Ex. B-1, R. 173, 170) The payment of the sidemen's compensation was in some instances made by means of a check drawn on the leader's bank account. (R. 136, 360, 361)

Petitioners never had any conversation with any leader or sideman of any orchestra regarding the compensation of the latter (R. 65, 73, 324), did not know the amount thereof or its manner of payment (R. 65, 73), and had nothing whatever to do with determining said amount. (R. 75, 98, 325, 326)

The gross contract price for each engagement was determined through barter negotiations between petitioners and leader or his booking agent. (R. 52, 73 and 266) This price was never paid by the petitioners to the sidemen but was always paid to the leader or his agent. (R. 60, 65, 75, 76, 135, 276, 322) The residue of the contract

price after the leader's payment of the compensation of the sidemen and other expenses of the orchestra, such as commissions, traveling and miscellaneous expenses, belonged solely to the orchestra leader. (R. 138, 168, 277, 361, 362) In the event no residue remained and there was a loss on the engagement, the leader alone, and not the sidemen, stood such loss. (R. 138, 277, 362)

With respect to the performance of each orchestra engagement, the leader directed the sidemen, dictating such matters as the style of music, its length, tempo and volume. (R. 55, 56, 73, 275, 315, 320, 321, 353-355) He owned the musical library of sheet music used by the orchestra and designated the various selections to be played therefrom (R. 58, 73, 133, 165, 271, 272, 350), determined the instrumentation of the orchestra (R. 56, 73, 133, 165, 275, 315, 352), determined the number of sidemen in the orchestra (R. 54, 73, 132, 151, 152, 164), prescribed and furnished the form of attire worn by the sidemen (R. 135, 166, 275, 314, 357), provided the music racks and public address system used by the orchestra in playing the engagement (R. 56, 57, 73, 135, 166, 275, 276, 319, 356), provided and arranged for the means of transportation to and from the engagement (R. 74, 135, 166, 167, 276, 313, 357), determined the placing of the musicians on the bandstand (R. 314, 356), conducted rehearsals of the orchestra prior to the engagement (R. 134, 135, 165, 166, 276, 355, 356), and planned and directed the presentation of any featured numbers. (R. 134, 321, 355)

Petitioners never gave any directions or instructions, either oral or written, to the leader and sidemen of any orchestra (R. 108, 315, 319); nor did petitioners believe they had the right to give such directions or instructions. (R. 102, 103, 318)

All of the orchestra engagements except that of Griff Williams and his orchestra at the Crystal Ballroom on

October 13, 1940, were "booked" through the use of what is known as the Form B contract. After the *Bartels* action was commenced defendant conceded in his answer that Griff Williams and his sidemen were not the employees of the Crystal Ballroom owners during this particular engagement. (R. 19)

The Form B contract above mentioned was a standard form of contract prepared by the American Federation of Musicians during late 1940 and early 1941 (Pltfs.' Ex. B-37, R. 583, 585, 582) at a time when orchestra engagements under an earlier federation official form of contract (Pltfs.' Ex. A, R. 399, 348) were being litigated in *Williams v. United States*, supra.

An order of the International Executive Board of the Federation promulgated by James C. Petrillo, as president, prescribed the Form B contract as the form of contract required to be used for all orchestra engagements "for the purpose of protecting our members under the Social Security Laws." (Pltfs.' Ex. B-37, R. 587, 582) In another statement announcing this new form of contract, Petrillo said: "All members of the Federation of Musicians are herewith instructed that, at the expiration of their present contracts with hotels, cafes, restaurants, etc., this standardized form of contract be accepted and put into force, and from then on the contractor or leader will not be held responsible for the payments of social security tax on such engagements." (Pltfs.' Ex. B-37, R. 585, 582)

Although the Form B contract purported to cover an arrangement whereby an engagement was booked for the members and leader of the orchestra severally, no new or different arrangement or contract was made with booking agencies for the purpose of causing those arrangements to conform to the recitals of the contract. (R. 444, 445, 454, 455, 477) For example, the same identical contract between Griff Williams and Music Corporation of

America remained in force and effect when both of the contracts for his different engagements at the Crystal Ballroom were made and when both engagements were played. (R. 454, 455, Pltfs.' Ex. N, R. 461-467, 455) This booking agency contract repeatedly refers to the employer-employee relationship between Griff Williams and the sidemen of his orchestra.

The Form B contract referred to the establishment owner as the "employer" and to the orchestra members, including the leaders, as "employees." The place, date, hours of work, agreed lump sum price and time of payment were specified. The contract contained a recital that "the employer shall at all times have complete control of the services which the employees will render under the specifications of this contract." (R. 12-14)

Although the Form B contract further provided that the leader should list on the reverse side or on a separate memorandum to be supplied the establishment owner the amount paid sidemen and to take and turn over to the establishment owner their receipts therefor, this provision was seldom complied with. The sidemen's receipts were never given the petitioners. (R. 65, 73, 98, 325) No separate memorandum was ever given the Geers (R. 325), and in only one instance was such a memorandum given the owners of the Crystal Ballroom. (Pltfs.' Ex. A-1, R. 99, 100, 98) The only contracts in the *Bartels* case listing any information on the reverse side were the contracts for engagements by Buddy Fisher and His Orchestra and Tiny Hill and His Orchestra (R. 97), and in the latter instance such information is incomplete. (Pltfs.' Ex. S, R. 83, 85, 82, Pltfs.' Ex. T, R. 87, 89, 82) The only leader in the *Geer* case who consistently listed on the contract the sidemen's names, social security numbers and the purported wages was Paul Moorhead and, significantly, even in this instance the amounts of wages so listed did not correctly state the

sidemen's actual compensation, the amounts specified being $5.00 a man for week day nights and $6.00 a man for Sundays (Pltfs.' Ex. B-6 to B-21, both incl. R. 177-251, 176) these sums being merely the union minimum scale (R. 325), whereas Paul Moorhead was paying his sidemen substantial sums above union scale during the period when the engagements were played. (R. 258)

When Roy Bartels, one of the petitioners, received one of the first Form B contracts from the booking agency which booked a number of the engagements at his place, he objected to its provisions referring to him as the employer and was told by that agency to go ahead and sign it, that it was just a change that had been requested by Petrillo, and that it would not change his status a bit. (R. 116) Because of this fact and the fact that he knew by-laws of the American Federation of Musicians made a part of the Form B contract, referred to the leader as the employer of the sidemen, Bartels did not believe at the time he signed the Form B contract for an orchestra engagement that such contract made him the employer of the orchestra members (R. 116-118, 121, 122) even though he was aware that such contract contained other recitals to that effect. (R. 101) Bartels was also told by the above mentioned booking agency that unless he signed the Form B contract he could not get the orchestra. (R. 53)

The same orchestras which played the engagements that are involved herein and were booked through the use of the Form B contract had previously played at petitioners' ballrooms in engagements antedating the promulgation of the Form B contract. (R. 53, 70, 102, 311, 327, 334) The manner in which the orchestras operated and the conduct and practices of the parties were the same in the case of the engagements booked under the Form B contract as they were in the case of the engagements for petitioners prior thereto. (R. 102, 139, 253, 277, 327, 364, 365)

All of the leaders and sidemen of the orchestras involved in these actions were members in good standing of the American Federation of Musicians. (R. 653) The Form B contract contains an express provision making all of the rules, by-laws and regulations of that organization a part of the contract and it further provides that "nothing in this contract shall ever be so construed as to interfere with any obligation which they (member musicians) may owe to the American Federation of Musicians." (Parenthetical insertion ours). Both at the time the Form B contracts involved in these causes were made and the time the engagements specified therein were played, certain by-laws of the Federation which were previously adopted at its annual convention and officially published by its Secretary as effective for the current year contained a number of provisions obviously designed to protect the sidemen of orchestras against various practices of orchestra leaders as employers. (Interveners' Ex. 6, R. 594-599, 592, Interveners' Ex. 7, R. 540-544, 538) Many of these by-laws refer to the leader as employing the sidemen (Interveners' Ex. 6, R. 596, 598, 592, Interveners' Ex. 7, R. 541, 542, 538), and three of them expressly prohibit the sidemen from contracting with an establishment owner. (Interveners' Ex. 6, R. 596, 598, 592, Interveners' Ex. 7, R. 541, 542, 538) Oscar F. Hild, member of the union's International Executive Board, called as a witness by interveners, testified that under the powers granted him by Article I, Section 1 of the by-laws, James C. Petrillo, Federation President, took action to change these by-laws by issuing an order which he identified as a letter sent by Petrillo to all union locals, on May 1, 1941, advising them that after June 1, 1941 only the Form B contract could be used by orchestras in booking engagements. (R. 502-504, 579-582, p. 21 of Pltfs.' Ex. B-37, R. 587, 582) Article I, Section 1 of the by-laws gives the union president power to issue an executive order

which "may by its terms annul and set aside by-laws or any portion thereof." (Interveners' Ex. 7, R. 538) Although Petrillo's said letter of May 1, 1941, which was the only notice of the alleged by-law change ever given to the union locals and booking agencies (R. 590, 591), makes no mention of any by-laws and does not by its terms purport to annul and set aside any by-law or part thereof (R. 578, 579; Pltfs.' Ex. B-37, R. 587, 582), the sum and substance of the witness Hild's testimony was that he considered such letter together with the Form B contract as changing the by-laws in question. (R. 604) While Section 3 of Article I of the union's by-laws require the Secretary to publish in its official publication not later than July following adoption "all laws that have been amended, added to, or in any way changed" (Interveners' Ex. 7, R. 539, 538), the official copies of the by-laws edited and published by the Secretary in 1941 and again in 1942 contain the same verbatim by-laws as were claimed by the witness Hild to have been changed by Petrillo's said letter of May 1, 1941. (Interveners' Ex. 7, R. 541, 542, 538, Interveners' Ex. 6, R. 596, 592) In July 1944 the Secretary certified that the revision of one of these by-laws, being Section 29 of Article X, which prohibits an establishment owner from hiring the sidemen of an orchestra, was not intended to take effect until September 15, 1944. (R. 605, 606; pp. 12 and 14 of Pltfs.' Ex. B-38, R. 615, 617, 614)

The actions were tried to the court without a jury. The court on consideration of the evidence entered findings of fact (R. 662-663) as follows:

> "1. That at all times, and during the times of the performances by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control over their orchestras and the members thereof, and the method and manner of doing the work. Such leader exercised and had the exclusive right to

hire and fire such members, to contract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances. Such leader organized, managed and controlled such orchestras as an independent organization for hire, and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes.

"2. The contract, Form B, was not entered into by fair negotiation between the parties, but upon demand of the musician's union and the leaders of the orchestras that it must be entered into or no orchestra could be obtained, and it was required to be so executed with the avowed purpose of protecting the leader from taxes as an employer. It was required by the leader to be entered into as an anticipatory arrangement to escape taxation. There was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestras, subsequent to June, 1941, or by reason of the Form B contract, than there was before that time, and the true relationship at all times as between the plaintiffs and such leaders was that the latter were independent contractors.

"3. At the time of the execution of the contracts, form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestras or any of the sidemen or the method or manner of doing its or their work in any particular.

"4. Considering all the facts and circumstances as disclosed by the evidence, including the contract Form B and its execution, none of the plaintiffs was at the time of the performance of the several orchestras on their premises the employer of the leader or of any of the members of the orchestras within the meaning of the Internal Revenue Statutes."

The district court on these findings concluded as a matter of law that the leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes and that none of the ballroom owners were the employers of the leader or any of the members of the orchestra within the meaning of such statutes (R. 663, 664), and accordingly entered judgments in favor of petitioners. (R. 664, 665)

After having the cases under advisement for more than eight and one-half months from the date on which they were orally submitted, the Circuit Court of Appeals for the Eighth Circuit by a divided court reversed the judgments of district court and remanded the causes. (R. 698) The majority opinion held that the Form B contract with its provisions giving the right of control of the orchestra's services to the ballroom owners established on its face the legal relationship of employer and employee as it existed at common law. Thereupon the court further held that the evidence failed to show that it was the actual intention of the parties that such right of control should remain in the leader, and that inasmuch as the evidence did not show that the contract was subsequently abrogated by the parties, the employment relationship established by the contract remained unchanged. (R. 683-698)

Circuit Judge Gardner, who dissented, was of the opinion that the findings of the trial court, including its third finding that parties at the time of the execution of the Form B contract did not thereby intend to transfer the right of control of the orchestra's services from the leader to ballroom owners, were supported not only by substantial but abundant evidence. He took the position that the Form B contract at most was simply a circumstance to be considered in determining the relationship of the parties and did not preclude the trial court from considering other facts showing their real relationship. (R. 698-708)

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered September 25, 1946. (R. 709-711) The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U.S.C., Sec. 347(a).

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of Section 1426 (b) and 1607 (c) of the Internal Revenue Code, together with the regulations issued thereunder, are set forth in Appendix A, infra, pp. 55 and 56.

QUESTIONS PRESENTED.

1. Whether petitioners were the employers of the leaders and members of orchestras which performed engagements at petitioners' ballrooms within the meaning of Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, which define employment for social security and employment tax purposes?

2. Whether a court, in determining the relationship of parties for social security and employment tax purposes, must confine its consideration solely to the provisions of a written contract which purport to vest the right of control over the services in one of the parties, or may consider other evidentiary facts which clearly establish a different relationship between the parties than that purported to be created by such provisions.

3. Did the Circuit Court of Appeals substitute its findings of fact for those of the district court supported by substantial evidence on the question of whether the parties actually intended that right of control of the orchestra's services should be in the ballroom owners and not the leader?

4. May a person who is admittedly an employer under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act shift to another the tax burdens imposed on him as such employer by the simple device of merely changing the wording of their written contract without any other factual change in their relationship?

5. Whether the court below erred in holding that certain by-laws of the American Federation of Musicians recognizing the orchestra leader as the employer of his sidemen and prohibiting the existence of an employment relationship between them and the ballroom owners, were not a part of the Form B contracts involved in these actions?

6. Whether the court below erred in holding that the Form B contract on its face created the relationship of employer and employee between the ballroom owners and the leaders and members of their orchestras?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

I.

The Opinion is in Direct Conflict With the Decisions of Other Circuit Courts of Appeal.

The court below, in determining the status of the parties for social security and employment tax purposes, held in effect that their written contract conclusively establishes an employment relationship and precludes consideration of other facts clearly showing their relationship to be different than that purported to be created by such contract. The trial court arrived at exactly the reverse findings of fact and conclusions of law by giving weight and effect to facts extraneous of the contract. The holding of the court

below is in direct conflict with the following decisions of other Circuit Courts of Appeal.

(1) *Spillson v. Smith*, 147 F. 2d 727 (C.C.A. 7th, 1945).

This case, like the present ones, involved the question of whether an establishment owner was the employer for social security tax purposes of an orchestra performing engagements under a form of contract, which, like the Form B contract, was prepared by the American Federation of Musicians and sought by appropriate language to fix the relationship between an establishment owner of the leader and members of an orchestra as that of employer and employee. The lower court, like the district court in the present cases, refused to regard the written contract of the parties as conclusive, and upon an examination of the actual facts found that the leader, and not the establishment owner, was the employer of the members of the orchestra. On appeal, the Seventh Circuit Court of Appeals affirmed, saying:

> "The law is well established that the employer-employee relationship is to be judged by the presence or absence of no single evidentiary factor, but by an overall view, *Anglim v. Empire Star Mines Co.*, 9 Cir., 129 F. 2nd 914, 917. * * *"

(2) *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th, 1942).

In this case the Seventh Circuit Court of Appeals held that Griff Williams, one of the interveners in the *Bartels* case, was the employer of the members of his orchestra while performing engagements at establishments under written contracts which recited that they were the "employer". The court held that while such contracts were some evidence that Williams was not the employer, "they too, however, must give away to more decisive and persuasive circumstances", such as the fact that Williams had

the right to hire and discharge the orchestra members, fix and determine their amount of pay and method of payment, and was engaged in an independent business for profit. These are some of the same factors which the trial court in the cases at bar considered in reaching its conclusion that petitioners were not the employers of the leaders and sidemen of the orchestras.

(3) *Anglim v. Empire Star Mines Co., Ltd.*, 129 F. 2d 914 (C.C.A. 9th, 1942).

In this case the question was whether miners performing services for a mine owner under a written lease agreement were employees of the latter for social security tax purposes. This agreement gave the owner the right to inspect the work, the right to require the discharge of objectionable workmen. and the right to furnish the tools with which the work was done. The court, after examining the conduct of the parties in practice, held that the miners were not the employees of the mine owner notwithstanding the provisions of the written lease. The court in its opinion said:

> "The quality of the relationship is to be judged by the presence or absence of no single evidentiary factor, but by an over-all view."

(4) *Matcovich v. Anglim*, 134 F. 2d 834 (C.C.A. 9th, 1943).

This case involved a written contract which sought to relieve a dance hall operator from the payment of social security taxes on sums paid to taxi dancers by referring to the latter as "licensees" and reciting that such licensees were not employees of the licensor and not subject to his control. The district court held that notwithstanding these recitals other facts showed the so-called "licensor" had the right of control. On appeal to the Circuit Court of Appeals, this holding was affirmed.

(5) *Gulf Refining Co. v. Brown*, 93 F. 2d 870 (C.C.A. 4th, 1938).

While this decision involved the determination of the employer-employee relationship for tort and not social security tax purposes, the rule of law announced by the court is directly contrary to that applied by the court below in the present cases. In refusing to regard as decisive of the relationship a written contract wherein defendant company sought to vest the right to control the work of certain persons in its so-called "consignee", just as the leaders in the present cases by the Form B contract sought to vest in the establishment owner the right to control the services of their sidemen, the court in that case said:

> "It is only by consideration of all of the facts pertaining to the relationship in any case, including the provisions of the contract, the actual conduct of the parties, and the conditions of the business in which they are engaged, that it can be determined whether the distributor is endowed with that control over his own methods and means of doing the work which is the test of an independent contractor. No more definite test has been devised, and the Restatement of Agency itself, section 220 (2), merely lists certain matters of fact which, amongst others, may be considered in determining whether one acting for another is a servant or independent contractor. When these nonexclusive tests are applied to the facts of the pending case, we find confirmation of the conclusion we have reached."

Petitioners here point out that the last two cases each involved an express provision purporting to deal with the right of control over the services rendered and hence the decision of the court therein refutes the distinction which the majority opinion attempts to make between what it refers to as "specific obligations in a contract legally definitive of a created relationship" and "general recitals or descriptions." (R. 691, 692).

II.

In These Cases the Circuit Court of Appeals has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question presented involves a determination of the test by which the employer-employee relationship should be judged by a court for federal social security and employment tax purposes. The majority opinion in effect holds that the only fact which a court may consider in making that determination in a case where a written contract purports to vest control over the services in one of the parties is the contract itself. The minority opinion expresses the view that a court, in making such determination, may consider, in addition to the contract, such further facts as the right to hire and discharge the persons doing the work, the method and determination of the amount of the payment of the workmen, whether the person furnishing the services was engaged in an independent business for profit, whether the conduct and practices of the parties remain unchanged from what they were prior to the contract, which party actually exercised control of the means and manner of performance of the work, and which party furnished the tools with which the work was done.

The foregoing question, insofar as it pertains to social security and employment taxes, has never been passed on by this court. Unless it is settled, persons in one jurisdiction will be taxed as employers under the Federal Insurance Contributions Act and Federal Unemployment Tax Act, while persons in other jurisdictions will be relieved from such taxation even though the facts and circumstances of the respective cases are identical.

Moreover, under the holding of the majority opinion,

an employer can escape the tax burdens now imposed on him by the foregoing enactments by the simple expedient of an adroitly worded contract and at the same time retain and exercise all of the usual prerogatives of an employer, such as the control of the work being done, the right to hire and fire the men doing the work, the right to fix and determine their pay, and the right to engage in an independent business for profit, just as was done by every orchestra leader in the present cases. Certainly a question involving a doctrine of such far-reaching consequences when applied to social security and employment tax legislation should be settled by this court.

III.

The Decision of the Circuit Court of Appeals in this Case Decides a Federal Question in a Way Probably in Conflict With the Applicable Decisions of this Court.

The majority opinion holds that since the form of contract on its face establishes the relationship of the parties as employer and employee the district court could not consider what the minority opinion (R. 708) refers to as the "abundant evidence" supporting that court's findings that the leaders of the orchestras were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes. Such evidence consisted of undisputed testimony showing facts, among others, as follows: that the leaders, and not the ballroom owners, hired and fired the sidemen (R. 131, 132, 133, 164, 270, 271, 346, 347, 349), fixed and determined the amount and method of payment of their wages (R. 136, 164, 272, 281, 346, 347), directed and controlled the manner and means of the sidemen's performances (R. 55, 56, 73, 275, 315, 320, 321, 353-355), furnished the transporta-

tion to and from the engagement (R. 71, 135, 166, 167, 276, 313, 357), and supplied all the tools with which the work was done (R. 58, 133, 135, 166, 275, 276, 319, 350, 357) excepting only the piano; that each leader was engaged in an independent business for profit from which he stood to make a gain or sustain a loss (R. 138, 168, 277, 361, 362), and that the manner in which the orchestras operated and the conduct and practices of the parties after the adoption of the Form B contract was no different from what they had been before. (R. 102, 139, 253, 277, 327, 364, 365)

While this court has not previously had occasion to apply the rule in a social security tax case, it has repeatedly held that in tax matters generally a trial court may disregard the terminology of the parties' written contract and base findings on circumstantial evidence showing the substance of the transaction or relationship to be different from that portrayed in such contract.

Commissioner v. Tower, ... U. S. . . . . , 66 S. Ct. 532, 90 L. Ed. Adv. Ops. 559.

Moline Properties, Inc. v. Commissioner, 319 U. S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499.

Griffiths v. Commissioner, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319.

While it so happens that in each of the above cases the rule was applied in favor of the government, there is nothing in the court's opinion to indicate that the rule is so limited, and in *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755, this court did not hesitate to apply the same rule in favor of the taxpayer.

The district court and Circuit Judge Gardner were of the opinion that the rule applied by this court in tax matters generally was applicable to the present case. Circuit Judges Johnsen and Woodrough were of a contrary opinion. It is submitted that the latter opinion decides a

federal question in a way probably in conflict with the above mentioned decisions of this court.

IV.

The Circuit Court of Appeals Has Erroneously so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call For an Exercise of This Court's Power of Supervision in that the Court Below Has Substituted Its Findings of Fact For Those of the District Court Supported by Substantial Evidence.

This court has repeatedly held that a Circuit Court of Appeals is without authority to weigh the evidence and substitute its findings of fact for those of the trial court supported by substantial evidence. *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, *McCaughn v. Real Estate Land, Title & T. Co.*, 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879, and *Adamson v. Gilliland*, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356. And this is true even though the evidence is open to "diverging inferences." *United States v. Jefferson Elec. Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859. The Circuit Court of Appeals has departed from this well settled rule of appellate procedure in at least two instances in its opinion in the present cases. One instance is with respect to the trial court's finding (R. 663) that there was no difference in the conduct and control of the orchestras, or the right to control such orchestras after the Form B contract than there was before that time. This finding was abundantly supported by the undisputed testimony of the leaders and ballroom owners that the manner in which the orchestras operated and the conduct and practices of the parties were the same in the case of the engagements booked after the Form B contract as they were before. (R. 102, 139, 253, 277, 327,

364, 365) The majority of opinion, having admitted that prior to such contract an orchestra leader was the employer of his sidemen (R. 687, 688) and hence possessed the right of control over them, proceeds to find that after the adoption of that contract such right was in the ballroom operators not merely as a legal but as "a practical reality as well" (R. 693), which is the equivalent of a finding that the parties had changed their conduct with respect to control of the sidemen and their services after the use of the Form B contract. Such a finding is directly contrary to the record evidence that the leaders, in the playing of engagements booked under such contract, at all times directed the performances of their sidemen, dictating such matters as the style of music, its length, tempo and volume (R. 55, 56, 73, 275, 315, 320, 321, 353-355), and the further record evidence that petitioners never gave any directions or instructions, either oral or written, to the leader and sidemen of any orchestra during the playing of its engagement (R. 108, 315, 319), and did not believe they had the right to give such directions. (R. 102, 103, 318) The finding is also contrary to one leader's testimony that both before and after the effective date of the Form B contract he did not permit an establishment owner to direct and instruct the sidemen of his orchestra. (R. 139) It is likewise contrary to the testimony of the leaders that they hired the sidemen who played the engagements (R. 130, 132, 164, 270, 346, 347), and the testimony of the petitioners that they never hired a sideman for any engagement. (R. 66, 73, 326, 327)

The majority opinion wholly ignores the foregoing mass of testimony which overwhelmingly sustains the finding of the trial court that the leader, and not petitioners, exercised the same control and right of control after the Form B contract that he did before. Instead the opinion, in order to support its contrary finding, cites an instance where

"in one of the engagements in suit the orchestra appeared without its regular piano player and the ballroom operator exercised the prerogative of selecting and requiring the leader to use a certain local musician for the performance." (R. 693) This instance which the majority opinion finds was "generally illustrative" of the fact that the right of control in the ballroom owners was a "practical reality" (R. 693) after the Form B contract is the *only instance* in the entire record in which interveners claimed any ballroom operator ever hired a sideman, and even in this instance the majority's version of what happened is directly contrary to the record testimony of Mr. Geer that he did not hire the musician in question but that the leader did (R. 321) and the record testimony of the leader wherein he refused to state that Mr. Geer hired her (R. 628) and admitted that he fixed the amount of her pay and paid her. (R. 629) Petitioners submit that in view of the foregoing record the Eighth Circuit Court of Appeals is clearly guilty of substituting its finding of fact on the matter in question for that of the trial court supported by substantial evidence, contrary to its powers as an appellate court.

The other instance wherein the majority opinion departs from the rule in question is with respect to the district court's third finding (R. 663) that the parties, at the time of the execution of the Form B contract, did not thereby intend to transfer control or the right of control over the sidemen and their method and manner of doing the work from the leader to the ballroom owners. There was not only substantial but abundant evidence to sustain this finding in the undisputed testimony of one of the petitioners that when he objected to the references to him as an employer in one of the first Form B contracts presented to him, he was told by the booking agency which represented the leader in negotiating the transaction and which booked a number of later orchestra engagements at the Crystal

Ballroom that the Form B contract was just a change that had been requested by Petrillo and that it would not change his status a bit. (R. 116) The finding is further supported by this same petitioner's testimony that he knew that certain by-laws of the musicians' union incorporated in the Form B contract by express reference referred to the leader as the employer of the sidemen (R. 120); that he didn't believe the Form B contract changed his status with the orchestra from what it had been before (R. 121); that he never understood that the terms of the contract were such that he assumed the obligations of an employer to the sidemen and the leader of the orchestra (R. 121); that in signing all the contracts he denied he was the employer (R. 122); and he never believed before or after the Form B contract that he had the right to give directions or instructions to the leader and sidemen of an orchestra in its performance of an engagement. (R. 102, 103)

Further evidence supporting the finding is the undisputed record fact that at the time the Form B contract was signed no new and different arrangement or contract was made between the leader and his booking agent, and that the then existing booking contract repeatedly referred to the employer and employee relationship between the leader and members of his orchestra. (R. 444, 445, Pltfs.' Ex. N, R. 461-467, 455, 556) Still further supporting evidence consisted of testimony of the leaders that the manner in which the orchestras operated and the conduct and practice of the parties was the same after the Form B contract as they were before (R. 139, 253, 277, 327, 364, 365), and the testimony of one of the leaders that he did not permit an establishment owner to direct the sidemen of his orchestra at any time during the period when its engagements involved herein were played. (R. 139)

In addition to this direct evidence supporting the district

court's above mentioned finding, there was also convincing circumstantial evidence consisting of the testimony of the leaders that they at all times did the hiring and discharging of the sidemen in their orchestras (R. 131-133, 164, 270, 271, 346, 347, 349), fixed and determined the amount and manner of payment of their wages (R. 136, 164, 272, 281, 346, 347), and directed and controlled their performances in the playing of an engagement (R. 55, 56, 73, 275, 315, 320, 321, 353-355), from which evidence a court could reasonably infer that the leader intended to exercise all the prerogatives of an employer including the right of control notwithstanding his execution of the Form B contract. Circuit Judge Gardner was of the opinion that this evidence was not only substantial but abundant to sustain the findings of the district court and that a finding that the contract correctly reflected the relationship of the parties would find no support in the evidence. (R. 708)

The majority opinion, while admitting that parol evidence is admissable to show that the parties intended a different agreement than that contained in their written contract (R. 690) finds that not only was there no evidence in the record showing such an agreement but that on the contrary the evidence that the ballroom operators, when the first Form B contract was presented to them, had objected to the provision giving them the legal right to control and making them the employers, and would not execute the contract until they were told that that was the only basis on which they could get the orchestra, was evidence of a specific agreement that the ballroom owners were to have the right of control. (R. 691) The fact that the person who gave the petitioners this information was the same booking agency which told them the Form B contract was just something Petrillo requested and that it would not change their status a bit, coupled with the other facts above set forth which sustain the trial

court's finding, made the real understanding of the parties in executing such contract a matter solely for the determination of that court, and the Circuit Court of Appeals has accordingly exceeded its authority in substituting its judgment respecting such matter for that of the district court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The majority opinion and decision of the Circuit Court of Appeals is in error in holding that a written contract which purports to vest the right of control over the services in one of the parties conclusively establishes a relationship of employer and employee and precludes consideration of facts which clearly prove a relationship different than that purported to be created by such contract.

II.

The majority opinion and decision of Circuit Court of Appeals is in error in substituting its findings of fact for those of the district court supported by substantial evidence on the question of whether the parties actually intended that the right of control over each orchestra's services should be in the ballroom owners and not the leader.

III.

The majority opinion and decision of the Circuit Court of Appeals is in error in holding that a contract devised for the purpose of escaping liability for social security and employment taxes not accompanied by change in the actual relationship of the parties is effectual for that purpose.

IV.

The majority opinion and decision of the Circuit Court of Appeals is in error in holding that certain by-laws of

the American Federation of Musicians recognizing the leader as the employer of his sidemen and prohibiting the existence of an employment relationship between them and the ballroom owners, were not a part of the Form B contracts involved in these actions.

A.

The letter of May 1, 1941, of James C. Petrillo, President of the American Federation of Musicians, did not constitute an implied repeal of the then existing by-laws in question.

B.

Assuming Petrillo's letter of May 1, 1941 did constitute an implied repeal of the then existing by-laws in question, such repeal did not nullify by-laws of like content which were reenacted at the annual convention of the American Federation of Musicians in June 1941 and again at its annual convention in June 1942, and were therefore in full force and effect at the time each of the Form B contracts involved in these actions was executed.

V.

The Circuit Court of Appeals is in error in holding that the Form B contract on its face created the relationship of employer and employee between the ballroom owners and the leaders and members of their orchestras.

ARGUMENT.

I.

The Majority Opinion and Decision of the Circuit Court of Appeals is in Error in Holding that a Written Contract Which Purports to Vest the Right of Control Over the Services in One of the Parties Conclusively Establishes a Relationship of Employer and Employee and Precludes Consideration of Facts Which Clearly Prove a Relationship Different than that Purported to be Created by Such Contract.

Both the district court and the Circuit Court of Appeals agree that in order to constitute an employment within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and the regulations issued thereunder, the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them, and that an independent contractor is not an employee. Their point of difference arises with respect to the factors which a court may consider in determining such relationship in a case where the written contract of the parties purports by appropriate terminology to fix their status as that of employer and employee. The trial court, following what it considered to be the rule laid down in numerous cases hereinafter mentioned, held that the contract was not conclusive of an employer-employee relationship but merely, "an element that may be considered by the fact finder if of any assistance in determining what is the true relationship." (R. 660) Circuit Judge Gardner concurs in this holding. (R. 708) The majority opinion, however, takes a contrary view and holds that the parties' written contract, because it "obligationally gives complete control of the services which one

person agrees to perform for another to the person for whom the work is done" establishes on its face the legal relationship of employer and employee as it existed at common law, thereby precluding a court's consideration of other factors which show that their actual relationship was that of independent contractor.

Petitioners believe this is the first case involving the performance of services by one person for another in which any court has ever held that the parties' written contract is the sole test by which the relationship of employer and employee is to be determined. This holding is directly contrary to the view taken by the American Restatement of the Law of Agency and unanimous decisions of courts which have had occasion to consider the question. Section 220 (1) of such Restatement, Volume I, page 483, defines a servant "as a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." Section 220 (2) states:

> "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered. * * *"

The section then lists *nine evidentiary factors* of which the parties' agreement respecting control over the details of the work is only one. Other facts listed as equally important are such matters as whether the person performing the services is engaged in a distinct occupation or business, the skill required in the particular occupation, the method of payment, who furnished the tools with which the work was done, and whether or not the parties believe they are creating the relationship of master and servant. These are among the very factors which the district court considered in making its findings (R. 662, 663), most of which are not even questioned by the ma-

jority opinion. That the trial court, in doing this, acted correctly is further shown by the Agency Restatement's comment on Section 220, page 484, as follows:

> "The relationship of master and servant is one not capable of exact definition. * * * *The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship.*" (Italics ours.)

The Agency Restatement's rule that the status of employer and employee is not to be judged by the single evidentiary factor of the parties' form of contract but by an overall view of all the facts and circumstances showing their true relationship is sustained by the decisions of courts in the following cases, wherein members of an orchestra were held to be the employees of the leader and not the establishment owner for social security employment tax purposes:

Spillson v. Smith, 147 F. 2d 727 (C.C.A. 7th).

Williams v. United States, 126 F. 2d 129 (C.C.A. 7th) certiorari denied, 317 U. S. 655, 63 S. Ct. 52, 87 L. Ed. 527.

Palmer v. Michigan Unemployment Compensation Commission, 310 Mich. 702, 18 N.W. 2d 83.

Nebraska Hotel Co. v. O'Malley, 63 F. Supp. 26 (Neb.).

In re Jermyn Hotel Company, (Pa. Common Pleas, Sept. 3, 1946) C. C. H. Unemployment Ins. Service, Pa. par. 8149.

In the last two cases above cited, which involved orchestra engagements under the same Form B contract as that involved herein, the court cited with approval the decision of the district court in the present cases.

The rule applied in the foregoing orchestra cases is sup-

ported by the uniform decisions of courts in social security and unemployment tax cases generally.

Matcovich v. Anglim, 134 F. 2d 834 (C.C.A. 9th).

Anglim v. Empire Star Mines Co., 129 F. 2d 914 (C.C.A. 9th).

Wabash R. R. Co. v. Finnegan, 67 F. Supp. 94 (E. D. Missouri).

Royal Theatre Corporation v. United States, 66 F. Supp. 301 (Kan.).

Willard Sugar Co. v. Gentsch, 59 F. Supp. 82 (N.D. Ohio).

Industrial Commission v. Northwestern Mutual Life Ins. Co., 103 Col. 550, 88 P. 2d 560.

Jack and Jill, Inc. v. Tone, 126 Conn. 114, 9 Atl. 2d 497.

In re Morton, 284 N.Y. 167, 30 N.E. 2d 369.

The rule is also sustained by the following decisions in workmen's compensation and tort cases:

Gulf Refining Co. v. Brown, 93 F. 2d 870 (C.C.A. 4th).

Bertino v. Marion Steam Shovel, 64 F. 2d 409 (C.C.A. 8th).

Sanford v. Goodridge, 234 Iowa 1036, 13 N. W. 2d 40.

Glielmi v. Netherland Dairy Company, 254 N. Y. 60, 171 N. E. 906.

Nestle's Food Co. v. Industrial Commission, 205 Wis. 467, 237 N. W. 117.

Brown v. Industrial Accident Commission, 174 Cal. 457, 163 Pac. 664.

The majority opinion, while admitting the general rule announced in the foregoing cases, holds that it is limited only to contracts containing general recitals and descriptive references and does not apply to a contract contain-

ing express obligations. (R. 691, 692) There is no foundation whatever for this novel view of the limited scope of the rule. In the first place, neither the Restatement of the Law of Agency nor any of the decisions sustaining the rule make any such distinction. In the second place, many of these decisions were in cases involving contracts which, in addition to containing general recitals and descriptive references, also contained clauses creating express obligations. For example, in *Spillson v. Smith*, supra, the orchestra contract provided that the establishment owner "was the employer to whom the musicians were directly responsible" and "any payment by the employer to the musicians' representative shall be as their agent for distribution among them." In at least seven of the cases above cited, *Matcovich v. Anglim*, *Gulf Refining Co. v. Brown*, *Wabash R. R. Co. v. Finnegan*, *Royal Theatre Corporation v. United States*, *Willard Sugar Company v. Gentsch*, *Nebraska Hotel Co. v. O'Malley*, and *In re Jermyn Hotel Company*, the contract between the parties contained an express provision dealing specifically with the right of control over the services rendered. Yet in each case the court went beyond the contract and determined the true relationship on the basis of all the facts and circumstances showing who in fact had the right of control over the work being done. The Fourth Circuit Court of Appeals, in the *Gulf Refining Co.* case, supra, in speaking of the matters of fact mentioned by Section 220 (2) of the Restatement of Agency, said:

> "When these nonexclusive tests are applied to the facts of the pending case, we find confirmation of the conclusion we have reached."

In *Williams v. United States*, supra, the Seventh Circuit Court of Appeals, in enumerating the factors, in addition to the parties' written contract, that a court may

take into account in determining who has the right of control over an orchestra's services, said:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work (*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *Densby v. Bartlett*, 318 Ill. 616, 149 N.E. 591, 42 A.L.R. 1406), the method and determination of the amount of the payment of the workmen (*Simonton v. Morton*, 275 Pa. 562, 119 A. 732), whether or not the person doing the work is engaged in an independent business or enterprise and, particularly, whether he stands to make a profit on the work of those working under him (*Barnes v. Myers*, 163 Md. 206, 161 A. 279, *Petzold v. McGregor*, 92 Ind. App. 528, 176 N.E. 640), which party furnishes the tools or materials with which the work is done (*Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440), and who has control of the premises where the work is done. *Murphy v. Herold Co.*, 137 Wis. 609, 119 N.W. 294."

Petitioners here point out that the five factors above mentioned by the Seventh Circuit Court of Appeals are the very factors to which the trial court in the present cases gave consideration, and with respect to all but one of them (control of the premises where the work was done) it found in favor of petitioners in findings which are not questioned by the court below. Surely it cannot be the law that these factors cease to have a bearing on the right to control simply because the parties attempt through the use of legalistic fiction in a form of written contract to define who, as between them, possesses such right. Take for example the right to hire and discharge the workmen. The Seventh Circuit Court of Appeals, at a later point in its opinion in the *Williams* case (p. 133 of 126 F. 2d), speaking of this right, said:

> "It is difficult to conceive of an employer-employee relationship without such a right on the part of the em-

ployer * * * Without this right there could be no effective control by an employer."

Does this right to hire and discharge in one person suddenly lose its potency as affecting the right of control in that person simply because a form of contract purports to place such control in someone else? A realistic view of the situation in the present cases requires that this question be answered in the negative. It was only through the exercise of this power to hire and fire which the trial court on undisputed evidence found the leader possessed that the latter could enforce his right to control the sidemen in the discipline, coordination of effort and standardization of performance necessary to produce a marketable musical entertainment which was what the leader was in business to sell. The possession of such power was just as real and vital to his right of control after the Form B contract as it was before. The same thing is true with respect to the other factors such as the right to fix, determine and pay the wages of the sidemen, the fact that the leader was engaged in an independent business for profit and furnished the tools with which the work was done. The majority opinion as Judge Gardner in his dissenting opinion points out "brushes aside the findings of the trial court" regarding these matters "and bases its conclusion upon the single fact that there was in form a contract which purported to fix the relationship of the parties." Under the unanimous view of the authorities, including the Restatement of the Law of Agency, this is clearly error on the part of the Circuit Court warranting a review and reversal of its decision by this court.

II.

The Circuit Court of Appeals is in Error in Substituting its Findings of Fact for those of the District Court Supported by Substantial Evidence on the Question of Whether the Parties Actually Intended that the Right of Control of Each Orchestra's Services Should be in the Ballroom Owners and not the Leader.

The majority opinion admits the parol evidence rule left petitioners "free to prove by parol, if the facts so were, that instead of the agreement having been that the legal right of control of the leader's and the orchestra members' services should be given to the ballroom operators, the agreement actually was that it would remain in the leader, or that the parties had never in fact undertaken to agree as to who should have the legal right to control." (R. 690) The opinion then proceeds to weigh the evidence and makes clear cut findings of fact in language as follows:

> "The evidence, however, in our opinion, fails to establish either of these situations in relation to the negotiation and execution of the contract. To the contrary it shows that, when the 'Form B' contract initially was presented to the ballroom operators in engaging the services of an orchestra, they had objected to the provision giving them the legal right of control and making them employers, until they were told that this was the only basis on which they could obtain the services of the orchestra, and that they thereupon executed the contract and each of the other contracts thereafter and accepted the services of the various orchestras under them. On these facts we think it must be held that the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra-members and so had created the common-law relation of employer and employee between them, at the time the contracts were executed at least." (R. 691)

Petitioners submit that foregoing finding of fact that "the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members" is directly contrary to the third finding of fact of the district court as follows:

> "3. At the time of the execution of the contracts, Form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestra or any of the sidemen, or the method or manner of doing its or their work in any particular." (R. 663)

The abundant record evidence which sustains this third finding of the trial court is fully reviewed on pages 24 to 26 of the petition for writs of certiorari, making a further recital thereof at this point unnecessary. The majority opinion wholly disregards this evidence and instead singles out to sustain its own conflicting finding on the same question of ultimate fact one bit of evidence to the effect that when the Form B contract was first presented to the ballroom operators they had objected to the Form B contract until they were told that was the only basis on which they could obtain the orchestra and thereupon executed the contract. (R. 691) The majority opinion wholly ignores one very significant fact which materially changes the whole import of this evidence, namely that in the same conversation with a leader's booking agent in which the ballroom owners were given this information, they were also told by such agent to go ahead and sign the contract, that it was just a change that had been requested by Petrillo, that

it would not give the ballroom owners any more power than they had before and that it would not change their status a bit. (R. 116) In this same connection petitioners here point out that the only contracts which petitioners intended to sign were contracts containing by-laws which they knew made the leader the employer of his sidemen (R. 118, 120) and if these by-laws were not then a part of the contract which is what the majority opinion holds (R. 695, 696), then obviously there was no meeting of minds so as to create any contract for each of the engagements in question, and this fact standing alone is sufficient to sustain the district court's third finding.

In an endeavor to strengthen its finding that the parol evidence showed that the parties specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members, the court below found that the conduct of the parties after its execution of the Form B contract showed that the right of control "did have not merely a legal but a practical reality as well." (R. 693) This finding conflicts squarely with the district court's first finding "that at all times and during the times of the performances by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work" (R. 662) and its second finding that "there was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestras, subsequent to June, 1941 than there was before that time." (R. 663) The record evidence showing that the leader and not petitioners exercised the same control and right of control after the Form B contract that he did before, and that the majority opinion's inference that petitioners once hired a piano player is without support in

the record, is fully set out in detail on pages 23 and 24 of the petition for writs of certiorari and for that reason will not be repeated here. Regarding the conclusive effect of this evidence, Circuit Judge Gardner said:

> "No case could more convincingly illustrate an agreement which purported to create a certain relationship while the actual conduct and operation of the parties established another." (R. 708)

Petitioners submit that since the findings of the trial court on the matters in question were supported by substantial evidence, the Circuit Court was without authority to weigh the evidence and substitute its own findings for those of the district court, and its action in so doing is error under the well settled rule of this court.

Great Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193.

McCaughn v. Real Estate Land, Title & T. Co., 297 U. S. 606, 56 S. Ct. 601, 80 L. Ed. 879.

United States v. Jefferson Elec. Mfg. Co., 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.

III.

The Majority Opinion of the Circuit Court of Appeals is in Error in Holding that a Contract Devised for the Purpose of Escaping Liability for Social Security and Employment Taxes Not Accompanied by Change in the Actual Relationship of the Parties is Effectual for that Purpose.

The district court found that the execution of the Form B contract was devised by the musicians' union with the avowed purpose of protecting the leader from taxes as an employer and that "it was required by the leader to be entered into as an anticipatory arrangement to

escape taxation." (R. 663) The majority opinion of the court below, while admitting that the purpose of the contract "was to shift as nearly as possible the social security tax burden previously borne by a leader on his orchestra-members to those engaging the services of the orchestra" (R. 687), nevertheless holds that the trial court was not on that account entitled to disregard the provision therein respecting control of the orchestra's services. The first reason given by the court, that the contract does not operate to deprive the government of any taxes which it would otherwise have received, is refuted by at least two undisputed record facts, the first of which is that the orchestras in the cases at bar, like all traveling orchestras, play many engagements for civic, charitable, educational and similar organizations. (R. 71, 127, 162, 163, 259, 330, 331, 112) If these organizations, and not the leaders, are held to be the employer of the sidemen of the orchestra (which would be the result under the decision of the court below), not one penny of social security and employment tax will be paid on the sums paid the sidemen performing such engagements for the reason that Sections 1426 (b) (8) and (b) (10), Sections 1607 (c) (8), (c) (10), and 101 (6), (7), (8), and (9) of the Internal Revenue Code expressly exclude charitable and educational institutions and pleasure, business and civic clubs from coverage under the Federal Insurance Contributions and Federal Unemployment Tax Acts.

The second fact to which petitioners have reference is the fact that in the present case the only three leaders who ever bothered to furnish the ballroom owners any listing of the sidemen and their pay on the reverse side of their Form B contract, as required by its terms, each misstated and understated the actual compensation of the sidemen. While the filled-in amounts on the reverse side of Paul Moorhead's contracts (Pltfs.' Exs. B-6

to B-24, both incl., R. 177-251, 176) and on the reverse side of Al Menke's contract (Pltfs.' Ex. B, R. 145-147, 140) correspond to the minimum local union scale (R. 325); each of these leaders, at the time the engagements booked by these contracts were played, was paying his sidemen above union scale. (R. 258, 136) While one of Blue Barron's contracts lists $10.00 as one evening's wages for a sideman (Pltfs.' Ex. B-34, R. 303-305, 290), this leader was paying his men a salary of $150.00 per week. (R. 326) Since the ballroom owners had nothing to do with fixing the pay of these sidemen (R. 75, 98, 325, 326), and did not know and had no way of determining the amount thereof (R. 65 and 73), it logically follows that if they, as the employer, are required to return the social security taxes thereon, the only amounts they can report as wages for that purpose are the sums listed by the leader or his booking agent on the contract, which means that the actual amounts paid by the leader in excess of such sums will entirely escape taxation. What happened in these three instances in the cases at bar will again happen countless times if the leader is relieved from his liability as an employer to return and directly pay to the government the tax on the actual wages which he pays the sidemen of his orchestra. This is so for one reason, among others, that it is utterly impossible for a leader to state in advance how much pay each musician will receive for a single night's work when the leader pays weekly salaries and usually doesn't know exactly how many nights in any week that his orchestra will play. The foregoing facts alone furnish ample support for the trial court's finding that the Form B contract was an anticipatory device to enable the leader to escape taxation.

The second reason given by the majority opinion is that "if the legal relationship of employer and employee was created between the ballroom operators and the orchestra

members, as it was here in the circumstances of the negotiation and execution of the contract, and that relationship had not thereafter been abrogated, the ballroom operators were simply bearing the burden of the taxes which the statute imposes upon anyone who occupies an employer's status." The opinion does not state what these "circumstances of the negotiation and execution of the contract" were, but at most they constituted merely evidence conflicting with the substantial evidence on which the trial court based its first finding that the parties at the time of the execution of the Form B contract did not thereby intend to transfer the right of control over the sidemen and their work from the ballroom owners to the leaders. The voluminous record facts making up this substantial evidence have been reviewed earlier on pages 21 to 26 of the petition for writs of certiorari and need not be repeated here.

Moreover, the reasoning of the court is erroneous because it assumes that the creation of an employer and employee relationship is to be determined solely from the circumstances of the negotiation and the execution of the contract without taking into account the all-important fact as to whether or not there was any actual change in the conduct of the parties after the contract from what it was before. The authorities uniformly hold that where the sole motivation for a contract is tax avoidance without any change in the actualities of the relationship a court should disregard such contract and determine their status from the substance, rather than the form of their relationship.

Commissioner v. Tower, ...U. S. ...., 66 S. Ct. 532, 90 L. Ed. Adv. Ops. 559.

Moline Properties, Inc. v. Commissioner, 319 U. S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499.

Griffiths v. Commissioner, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319.

Doll v. Commissioner, 149 F. 2d 239 (C.C.A. 8th),

Matcovich v. Anglim, 134 F. 2d 834 (C.C.A. 9th).

Wabash R. R. Co. v. Finnegan, 67 F. Supp. 94 (E. D. Missouri).

Royal Theatre Corporation v. United States, 66 F. Supp. 301 (Kan.).

Nebraska National Hotel Company v. O'Malley, 63 F. Supp. 26 (Neb.).

Spillson v. Smith, (N. D. Ind.) C. C. H. Unemployment Insurance Service, Vol. 1, par. 9111.

McDermott v. Henrickson, 45 F. Supp. 277 (S. D. Wash.).

Electrolux Corporation v. Board of Review, 129 N.J.L. 154, 28 A. 2d 207.

The record evidence which brings the present cases squarely within the rule of the foregoing decisions shows that all of the orchestras had played engagements at petitioners' ballrooms prior to the Form B contract (R. 53, 70, 311), and that every one of the leaders who testified stated that there was no difference or change in their relationships with the petitioners or in the manner of performance of the engagements after the Form B contract came into use from that which existed prior thereto. (R. 139, 253, 277, 364, 365, 397) Petitioners each testified to like effect. (R. 67, 102, 327)

The majority opinion admits that prior to the Form B contract "a leader had been held to be an independent contractor and to be liable for the payment of Social Security Taxes on his orchestra-members." (R. 688) As above stated, the undisputed record evidence shows that, except for the change in the form of the contract, the facts and circumstances relating to the engagements booked under the Form B contract were the same as before that contract was devised. The correctness of the majority opinion must therefore stand or fall on the bare proposition that even though there was no material factual difference in the true re-

lationship of the parties, the mere existence of a written contract skillfully and adroitly devised to cause a shifting of a tax burden, requires a court to conclude that a new and different taxpayer is the employer. That is exactly what the courts have consistently refused to do, and, as said by the court in the *McDermott* case, supra, an original relationship once established "cannot be completely altered into something else by a mere matter of nomenclature."

IV.

The Majority Opinion and Decision of the Circuit Court of Appeals is in Error in Holding that Certain By-Laws of the American Federation of Musicians Recognizing the Orchestra Leader as the Employer of His Sidemen and Prohibiting the Existence of an Employment Relationship Between Them and the Ballroom Owners, Were Not a Part of the Form B Contracts Involved in These Actions.

A.

The Letter of May 1, 1941, of James C. Petrillo, President of the American Federation of Musicians, Did Not Constitute an Implied Repeal of the Then Existing By-Laws in Question.

The Form B contract expressly recites that "all the rules, laws and regulations of the American Federation of Musicians * * * are made a part of this contract" and expressly provides that in case of conflict between any of the provisions of the contract and the obligations of members of the union as specified in the by-laws, the by-laws are controlling. (R. 12, 13) A comparison of the Union Secretary's official compilation of that organization's by-laws for the year 1940 (Pltfs.' Ex. B-39, R. 607-614) with his official

compilation of its by-laws for the years 1941 and 1942 (Interveners' Exs. 6 and 7, R. 592-599 and 538-545) discloses that no changes whatever were made in numerous by-laws obviously enacted to protect the sidemen of orchestras against various practices of their brother members who, as orchestra leaders, were their employers, with the result that the Form B contract contains provisions which directly contradict and nullify the effect of artful language elsewhere set forth in the contract seeking to make it appear that the establishment owner, and not the leader, was the employer of the sidemen.

These by-laws are as follows:

(1) *By-laws recognizing the leader's right to hire the sidemen of his orchestra.*

Sections 24 and 27 of Article IX (Pltfs.' Ex. B-39, R. 611, 607; Interveners' Exs. 6 and 7, R. 594, 592 and 540, 538)

Sections 24, 29, 39 and 45 of Article X. (Pltfs.' Ex. B-39, R. 611-612, 607; Interveners' Exs. 6 and 7, R. 595-597, 592 and 540-542, 538)

Section 18 of Article XII. (Pltfs.' Ex. B-39, R. 613, 607; Interveners' Exs. 6 and 7, R. 598, 592 and R. 543, 538)

Sub-sections I and L of Section 10 of Article XIII. (Pltfs.' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544-545, 538)

(2) *By-law recognizing leader's right to discharge sidemen of his orchestra.*

Section 10-K of Article III. (Pltfs.' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544, 538)

(3) *By-laws recognizing leader's right to pay his sidemen and determine the amount of their compensation.*

Sections 23 and 48 of Article X. (Pltfs.' Ex. B-39, R. 610, 612, 607; Interveners' Exs. 6 and 7, R. 595, 597, 592 and 541, 543, 538)

(1) *By-laws recognizing leader as an independent contractor engaged in business for himself.*

Section 48 of Article X. (Pltfs.' Ex. B-39, R. 612, 613, 607; Interveners' Exs. 6 and 7, R. 597, 592 and 543, 538)

Section 10-C of Article XIII. (Pltfs.' Ex. B-39, R. 613, 607; Interveners' Exs. 6 and 7, R. 598, 592 and 544, 538)

The federal courts have held, in cases involving earlier forms of union contract which also incorporated by express reference the by-laws of the American Federation of Musicians, that Section 29 of Article X prohibits the existence of the relationship of employer and employee between an establishment owner and the sidemen of an orchestra notwithstanding other recitals in the contract purporting to create that relationship. *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th), *Los Angeles Athletic Club v. United States*, 54 F. Supp. 702 (S. D. Cal.) and *Spillson v. Smith*, (N. D. Ind.) C. C. H. Unemployment Service, Vol. 1, Par. 9111.

The district court, having concluded that each leader, and not the ballroom owners, was the employer of the members of his orchestra for the reasons stated in its opinion, did not find it necessary to pass on the question of whether the above mentioned by-laws were a part of the Form B contracts used to book the engagements involved in these actions. The Court of Appeals, however, because of its holding that the provisions of the Form B contract were conclusive of the relationship of the parties, necessarily was required to dispose of the question because of the contract's recital making such by-laws a part of the contract. It did so by holding that the statements of James C. Petrillo, President of the Musicians' Union, in his letter of May 1, 1941 (see page 21 of Pltfs.' Ex. B-37, R. 587, 582) to all locals that "this contract and none other must be used on all such engagements on and after June 1, 1941"

and "any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for such said violation" sufficiently required under the absolute powers vested in him by Section 1 of Article I of the by-laws, that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with the relationship attempted to be created by the provision for control in the Form B contract. (R. 696)

Petitioners contend that this holding is in error for two reasons. The first is that the only way Petrillo could change existing by-laws under the extraordinary power given him by Section 1 of Article I was by the issuance of an executive order which "by its terms" annulled or set aside the same. Petrillo's said letter of May 1, 1941, since it mentioned neither the by-laws nor anything about nullifying or setting them aside, was obviously not an exercise of this power. To nevertheless hold, as the court below did, that such letter had the effect of nullifying the by-laws by implication, is to grant Petrillo a power not contemplated by said Section 1 of Article I. In this connection it must be borne in mind that the meaning and effect of the absolute power which said section granted Petrillo to *nullify* any by-law was such as to require the entire musical entertainment world and the performers therein to be bound by a contract which amounts to an agreement that the rights, duties and liabilities of parties thereto shall be whatever Petrillo may by his arbitrary, capricious or wise decision, decide and determine them to be. It was because of the shocking extent of this extraordinary power that the union in its grant thereof expressly provided the safeguard that the same should be exercised in one and only one way, namely, by an order which "by its terms" *annuls* or sets aside a by-law. Not having been

so exercised in the cases at bar, the power remained unexercised and the by-laws remained unchanged.

The second reason the majority opinion's said holding is in error is that at the time said letter was promulgated by Petrillo, neither he nor the American Federation of Musicians intended it to have the effect of nullifying any by-laws. The letter itself shows this to be true, not only because of the utter absence of any mention of the by-laws or any change therein, but also because its statement that "this contract and none other must be used on all such engagements on and after June 1, 1941", viewed in the light of the fact that the contract expressly incorporates by refence all by-laws as a part thereof, is as equally applicable to the contract's by-law provisions as it is to the contract's right of control provision. Being thus equivocal in nature, it furnishes no basis whatever for an inference that he intended the latter provision to supersede those containing the union by-laws. Moreover, the most the union's own witness ever claimed that Petrillo intended to accomplish was a revision and not a nullification of the by-laws. (R. 573)

Other circumstances which clearly show that neither Petrillo nor the union intended the former's letter of May 1, 1941 to have the effect ascribed to it by the majority opinion are the fact that the official copies of the federation's by-laws edited and published by its Secretary later in the year 1941 (Pltfs.' Ex. 7, R. 540-545, 538) and again in 1942 (Pltfs.' Ex. 6, R. 594-599, 592) contain the same verbatim by-laws as were claimed to have been nullified by such letter, and the fact that when the Secretary in July, 1941 officially certify to a revision of Section 29 of Article X (one of the by-laws claimed to have been nullified by Petrillo) he officially stated that such revision was *not intended to take effect until September 1, 1944!* (R. 605, 606; pp. 12 and 14 of Pltfs.' Ex. B-38, R. 615, 617, 614)

Surely the nullification by Petrillo by the exercise of his emergency powers of a score or more of by-laws which had been on the books for more than fifteen years would have been an event of such noteworthy importance that the Secretary, whose duty it was to publish in the union's official journal not later than July following adoption all by-law changes (Interveners' Ex. 7, R. 539, 538), would have caused the same to be reflected in his official publication of the by-laws for the years 1941 and 1942. That he did not do so, shows that the letter was not intended to have the effect which the majority opinion holds that it had.

Although the majority opinion of the court below held that the by-laws should not be treated or considered as a part of the contract by reason of Petrillo's proper exercise of "absolute" powers vested in him, it is noteworthy that the Circuit Court opinion claims that the effect of Petrillo's order was not *nullification* as provided for in Section 1 of Article I of the by-laws, but to "require . . . that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with . . . the 'Form B' contract." It is difficult to see how this statement of the Circuit Court's opinion can be squared with the provision of the Form B contract itself reciting that "the musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians." Every one of the by-laws in question created an obligation of the orchestra members to the federation. For example, Section 29 of Article X bound them to accept employment from the leader and not the ballroom owners. The court below, in holding that the contract's provision regarding right of control made the sidemen the employees of the ballroom owners, was obviously guilty of a construction

of the contract which directly interfered with the foregoing obligation. The same thing is true with respect to all the other by-laws in question. Petitioners submit that the above mentioned clause required the court below to consider the by-laws as paramount to any conflicting provision in the contract. That is exactly the effect which district court in *Spillson v. Smith*, supra, gave to the very same clause in the form of union orchestra contract which immediately preceded the Form B contract.

B.

Assuming Petrillo's Letter of May 1, 1941 Did Constitute an Implied Repeal of the Then Existing By-Laws in Question, Such Repeal Did Not Nullify By-Laws of Like Content Which Were Re-Enacted at the Annual Convention of the American Federation of Musicians in June 1941 and Again at its Annual Convention in June 1942, and Were Therefore in Full Force and Effect at the Time Each of the Form B Contracts Involved in These Actions Was Executed.

The by-laws of the American Federation of Musicians making an orchestra leader the employer of the sidemen and prohibiting the existence of an employment relationship between them and an establishment owner were all re-enacted at that organization's forty-sixth annual convention held at Seattle, Washington, June 9-14, 1941 (R. 535, 536, Pltfs.' Ex. 7, R. 538, 540-541), which was nearly a month and a half after May 1, 1941, the date on which Petrillo's letter prescribing the use of the Form B contract was sent to all union locals. The earliest Form B contract used to book an engagement in the case at bar is dated June 25, 1941 (Pltfs.' Ex. W, R. 80, 82), which means that all of the Form B contracts involved herein were

executed after the dates of the union's Seattle convention and hence all the by-laws adopted at that meeting necessarily became a part of those contracts. The same by-laws were again re-enacted by the union the following year at its annual convention held at Dallas, Texas, June 8-13 (Pltfs.' Ex. 6, R. 592, 594-599). Several of the Form B contracts in the cases at bar were executed in the year 1942 after these dates. (Pltfs.' Ex. A, R. 141, 140, and Pltfs.' Exs. B-17 to B-23 incl., R. 221-245, 176)

It clearly appears from the foregoing record that even if it be assumed that Petrillo's letter of May 1, 1941 constituted an implied repeal of the by-laws in question existing on that date, such letter did not nullify by-laws of like content in force on the dates the Form B contracts involved herein were executed for the reason that all of such by-laws were re-enacted by the union at a time subsequent to the date of such letter and hence could not possibly have been affected by the alleged action of Petrillo taken prior to such time.

V.

The Circuit Court of Appeals is in Error in Holding that the Form B Contract on its Face Created the Relationship of Employer and Employee Between the Ballroom Owners and the Leaders and Members of Their Orchestras.

The decision of the court below that the Form B contract establishes on its face the legal relationship of employer and employee is based entirely on the assumption that its recital dealing with the right of control over the orchestra's services had the legal effect of vesting in the ballroom owners the right to control the means and manner of the performance of the orchestra members. Petitioners submit that a proper analysis of the exact language

of such recital in the light of other provisions in the contract shows this assumption to be wholly unwarranted. That language clearly states that the services over which control is granted are "the services to be rendered under the specifications of this contract." The only specifications of the contract are: (1) the place where the services are to be rendered, (2) the date on which they are to be performed, and (3) the duration of the same. These three specifications *are all matters pertaining to results to be accomplished. There is not a single specification in the Form B contract regarding the details of the work to be performed by the individual orchestra members.*

The manner of performance of their work not being "a specification of the contract" the contract provision as to control actually negatives rather than establishes an employment relationship between the sidemen and the ballroom proprietors. However viewed, the provision referred to is too indefinite to permit the interpretation that it granted control over the details of the work to be performed by the musicians under the contract. It cannot, by any stretch of the imagination, be said to have granted to petitioners the right of directing how or in what manner the sidemen in the orchestra should actually perform their services. In taking exactly this view of a similar provision of a written contract involved in the case of *Humpton v. Unterkircher & Sons*, 97 Iowa 509, 66 N. W. 776, the Supreme Court of Iowa said:

> "It is true that each contract provides that the work was to be done under the direction of the defendants, and their architect, and to their entire satisfaction, approval, and acceptance; but it is manifest that this direction, approval, and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by

either of these contractors. They could not say who should be employed, or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought about, or who should do it."

There are still other striking deficiencies in the Form B contract which would have to be considered if it were to be looked upon as determinative evidence. Other than the establishment, there are no other signatory parties except the leader or his booking agent. No provision is made for any sideman's signature on the contract. It is the leader who specifies on the contract the amount of pay to be received by each member of the orchestra and therefore has, on the face of it, the right to control that matter.

CONCLUSION.

For all of the reasons stated writs of certiorari should be granted in these causes and this court should review the decision of the Eighth Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

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APPENDIX A.

STATUTES AND REGULATIONS.

Section 1426 of the Internal Revenue Code, as amended by Section 606 of Social Security Act Amendments of 1939 (26 U. S. C., Sec. 1426): "DEFINITIONS.

* * * * * * * * *

"(b) *Employment.* The term 'employment' means * * * any service, of whatever nature, performed * * * by an employee for the person employing him." * * *

* * * * * * * * *

The definition of employment in Section 1607 (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939, is identical.

Treasury Regulations 106, pertaining to the Federal Insurance Contributions Act:

"Sec. 402.204. *Who are employees.* Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

"Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another

merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

"Generally, physicians, lawyers, dentists, veterinarians contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

"Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act . . ."

Treasury Regulations 107, Section 403.204, pertaining to the Federal Unemployment Tax Act, are identical.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 731.

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT.

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS, RESPONDENTS.

No. 732.

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

BRIEF OF PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 731.

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS, RESPONDENTS

No. 732.

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

BRIEF OF PETITIONERS.

THE OPINIONS BELOW.

The opinion of the District Court (R. 654-664) is reported in 59 F. Supp. 84. The majority opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 682-698) is reported in 157 F. 2d 295 and the dissenting opinion of Circuit Judge Gardner (R. 698-709) is reported in 157 F. 2d 305.

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered September 25, 1946. (R. 709-711) The petition for writs of certiorari was filed on the 29th day of November, 1946 and was granted January 6, 1947. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U.S.C., Sec. 347 (a).

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of Section 1426 (b) and 1607 (c) of the Internal Revenue Code, together with the regulations issued thereunder, are set forth in Appendix A, infra, pp. 97 and 98.

STATEMENT OF THE CASE.

These actions were brought in the United States Court for the Southern District of Iowa by petitioners for refunds of social security and employment taxes with respect to the services of eleven orchestras which furnished music for public dances held at petitioners' ballrooms during the years 1940, 1941 and 1942. The cases were consolidated for trial in the district court (R. 48) and for hearing of the appeals in the Circuit Court of Appeals. (R. 675)

The leaders of the six orchestras involved in the *Bartels* case intervened in that action. (R. 20-36) Griff Williams, one of the interveners, is the same Griff Williams whose orchestra was involved in a case of *Williams v. United States*, 126 F. 2d, 129 (C.C.A. 7th, 1942), certiorari denied, 317 U.S. 655, 63 S. Ct. 52, 87 L. Ed. 527 (R. 329), wherein Williams, and not the establishments at which his orchestra played engagements, was held to be the employer of the members of his orchestra for social security tax purposes.

The leaders of the orchestras involved in the *Geer* case

did not intervene in that action. Their names are Al Menke, Les Hartman, Jimmy Barnett, Paul Moorhead, Blue Barron and "Doc" Lawson. (R. 289, 290)

The evidence upon the trial disclosed that the orchestras were traveling orchestras which the ballroom proprietors secured through negotiations with either booking agents or the leaders. (R. 312, 313) No negotiations were had with the members of the orchestra (R. 52, 312), known in the trade as "sidemen." (R. 448) These traveling orchestras usually held forth in single evening performances in what are known as "one night stands." (R. 331)

Each of the orchestras was organized and established as a permanent enterprise many years prior to its engagement for petitioners. (R. 70, 71, 132, 162, 259, 311 and 329) Each leader conducted his orchestra as an independent business and held himself out to the public as ready, able and willing to serve anyone who might desire engagements. (R. 126, 127, 259, 330 and 331) The name of each leader and his orchestra and his particular style of music was extensively advertised either by the leader or his booking agent. (R. 134, 259, 312, 339-341, Pltfs.' Ex. B-25, R. 261 and 260, Pltfs.' Ex. C, R. 403-414, 338) Each orchestra operated over a wide territory in which it was well known, having played engagements therein for various ballrooms, hotels, amusement parks, clubs, lodges, city fire and police departments, American Legion Posts, fairs, college groups, high school classes and civic organizations. (R. 71, 127, 162, 163, 259, 265, 330, 331 and 442)

The services of each orchestra consisted of the playing of popular dance music in a distinctive style, as developed and determined by the leader in order that his name and the name of his orchestra might acquire and maintain a reputation and receive public approval and acceptance throughout the territory in which it played.

(R. 73, 74, 131, 165, 253, 271, 281) The leader in the case of each orchestra selected the musicians, instrumentation and musical arrangements which he thought would enable the orchestra to produce, under his direction, the particular style of music he had in mind. (R. 131, 165, 271, 352) He trained and rehearsed the sidemen for the purpose of accomplishing this result, and in the playing of an actual engagement he led and directed them in the manner of their performance so as to make sure that they played the distinctive style of music by which the leader and his orchestra had become identified in the minds of the public. (R. 131, 132, 165, 276, 352, 353)

Prior to engaging each of the orchestras, petitioners were familiar with the reputation and special quality of music of each leader's orchestra. (R. 53, 54, 74, 312) In each instance petitioners relied on the leader of the orchestra to bring to their respective ballrooms an established organization composed of musicians selected and rehearsed by him and capable of performing the orchestra's distinctive style of music with which petitioners were familiar. The reputation and public acceptance of such "Name Bands" were the things which caused petitioners to agree to pay the price for the engagement demanded by the leader or his booking agent. (R. 54, 74, 313)

The sidemen of the orchestras were selected and hired by the leaders (R. 131, 132, 164, 270, 346, 347) and were discharged by the leaders. (R. 133, 164, 271, 349) Petitioners never hired or discharged any sideman of any of the orchestras and never had any conversation with any leader or sideman about hiring or discharging the latter. (R. 66, 73, 326, 327) Nor did petitioners believe that they had the right to discharge any sideman. (R. 66, 67)

The salary or wages of each sideman of an orchestra, the length and terms of his employment, were fixed and determined by the leader at the time he made his hiring

arrangement with such sideman (R. 136, 164, 272, 281, 346, 347), which was months and even years prior to the orchestra's engagement at petitioners' ballroom. (R. 132, 163, 270, 348, 349) Usually the compensation which the leader agreed to pay his sidemen was a flat weekly salary (R. 136, 158, 168, 272, 326) which the leader was bound to pay regardless of whether the orchestra played engagements. (R. 136, 151, 152, 272) Some of the leaders kept a written payroll record showing the names of the sidemen and the amounts of their weekly salary. (R. 137, 168, 281, and Pltfs.' Ex. B-1, R. 173, 170) The payment of the sidemen's compensation was in some instances made by means of a check drawn on the leader's bank account. (R. 136, 360, 361)

Petitioners never had any conversation with any leader or sideman of any orchestra regarding the compensation of the latter (R. 65, 73, 324), did not know the amount thereof or its manner of payment (R. 65, 73), and had nothing whatever to do with determining said amount. (R. 75, 98, 325, 326)

The gross contract price for each engagement was determined through barter negotiations between petitioners and leader or his booking agent. (R. 52, 73 and 266) This price was never paid by the petitioners to the sidemen but was always paid to the leader or his agent. (R. 60, 65, 75, 76, 135, 276, 322) The residue of the contract price after the leader's payment of the compensation of the sidemen and other expenses of the orchestra, such as commissions, traveling and miscellaneous expenses, belonged solely to the orchestra leader. (R. 138, 168, 277, 361, 362) In the event no residue remained and there was a loss on the engagement, the leader alone, and not the sidemen, stood such loss. (R. 138, 277, 362)

With respect to the performance of each orchestra engagement, the leader directed the sidemen, dictating such

matters as the style of music, its length, tempo and volume. (R. 55, 56, 73, 275, 315, 320, 321, 353-355) He owned the musical library of sheet music used by the orchestra, and designated the various selections to be played therefrom (R. 58, 73, 133, 165, 271, 272, 350), determined the instrumentation of the orchestra (R. 56, 73, 133, 165, 275, 315, 352), determined the number of sidemen in the orchestra (R. 54, 73, 132, 151, 152, 164), prescribed and furnished the form of attire worn by the sidemen (R. 135, 168, 275, 314, 357), provided the music racks and public address system used by the orchestra in playing the engagement (R. 56, 57, 73, 135, 166, 275, 276, 319, 356), provided and arranged for the means of transportation to and from the engagement (R. 74, 135, 166, 167, 276, 313, 357), determined the placing of the musicians on the bandstand (R. 314, 356), conducted rehearsals of the orchestra prior to the engagement (R. 134, 135, 165, 166, 276, 355, 356), and planned and directed the presentation of any featured numbers. (R. 134, 321, 355)

Petitioners never gave any directions or instructions, either oral or written, to the leader and sidemen of any orchestra (R. 108, 315, 319), nor did petitioners believe they had the right to give such directions or instructions. (R. 102, 103, 318)

All of the orchestra engagements except that of Griff Williams and his orchestra at the Crystal Ballroom on October 13, 1940, were "booked" through the use of what is known as the Form B contract. After the *Bartels* action was commenced defendant conceded in his answer that Griff Williams and his sidemen were not the employees of the Crystal Ballroom owners during this particular engagement. (R. 19)

The Form B contract above mentioned was a standard form of contract prepared by the American Federation of Musicians during late 1940 and early 1941 (Pltfs.' Ex.

B-37, R. 583, 585, 582) at a time when orchestra engagements under an earlier federation official form of contract (Pltfs.' Ex. A, R. 399, 348) were being litigated in *Williams v. United States*, supra.

An order of the International Executive Board of the Federation promulgated by James C. Petrillo, as president, prescribed the Form B contract as the form of contract required to be used for all orchestra engagements "for the purpose of protecting our members under the Social Security Laws." (Pltfs.' Ex. B-37, R. 587, 582) In another statement announcing this new form of contract, Petrillo said: "All members of the Federation of Musicians are herewith instructed that, at the expiration of their present contracts with hotels, cafes, restaurants, etc. this standardized form of contract be accepted and put into force, and from then on the contractor or leader will not be held responsible for the payments of social security tax on such engagements." (Pltfs.' Ex. B-37, R. 585, 582)

Although the Form B contract purported to cover an arrangement whereby an engagement was booked for the members and leader of the orchestra severally, no new or different arrangement or contract was made with booking agencies for the purpose of causing those arrangements to conform to the recitals of the contract. (R. 444, 445, 454, 455, 477) For example, the same identical contract between Griff Williams and Music Corporation of America remained in force and effect when both of the contracts for his different engagements at the Crystal Ballroom were made and when both engagements were played. (R. 454, 455, Pltfs.' Ex. N, R. 461-467, 455) This booking agency contract repeatedly refers to the employer-employee relationship between Griff Williams and the sidemen of his orchestra.

The Form B contract referred to the establishment owner as the "employer" and to the orchestra members,

including the leaders, as "employees." The place, date, hours of work, agreed lump sum price and time of payment were specified. The contract contained a recital that "the employer shall at all times have complete control of the services which the employees will render under the specifications of this contract." (R. 12-14)

Although the Form B contract further provided that the leader should list on the reverse side or on a separate memorandum to be supplied the establishment owner the amount paid sidemen and to take and turn over to the establishment owner their receipts therefor, this provision was seldom complied with. The sidemen's receipts were never given the petitioners. (P. 65, 73, 98, 325) No separate memorandum was ever given the Geers (R. 325), and in only one instance was such a memorandum given the owners of the Crystal Ballroom. (Pltfs.' Ex. A-1, R. 99, 100, 98) The only contracts in the *Bartels* case listing any information on the reverse side were the contracts for engagements by Buddy Fisher and His Orchestra and Tiny Hill and His Orchestra (R. 97), and in the latter instance such information is incomplete. (Pltfs.' Ex. S, R. 83, 85, 82, Pltfs.' Ex. T, R. 87, 89, 82) The only leader in the *Geer* case who consistently listed on the contract the sidemen's names, social security numbers and the purported wages was Paul Moorhead and, significantly, even in this instance the amounts of wages so listed did not correctly state the sidemen's actual compensation, the amounts specified being $5.00 a man for week day nights and $6.00 a man for Sundays (Pltfs.' Ex. B-6 to B-21, both incl. R. 177-251, 176) these sums being merely the union minimum scale (R. 325), whereas Paul Moorhead was paying his sidemen substantial sums above union scale during the period when the engagements were played. (R. 258)

When Roy Bartels, one of the petitioners, received one of the first Form B contracts from the booking agency

which booked a number of the engagements at his place, he objected to its provisions referring to him as the employer and was told by that agency to go ahead and sign it, that it was just a change that had been requested by Petrillo, and that it would not change his status a bit. (R. 116) Because of this fact and the fact that he knew by-laws of the American Federation of Musicians made a part of the Form B contract, referred to the leader as the employer of the sidemen, Bartels did not believe at the time he signed the Form B contract for an orchestra engagement that such contract made him the employer of the orchestra members (R. 116-118, 121, 122) even though he was aware that such contract contained other recitals to that effect. (R. 104) Bartels was also told by the above mentioned booking agency that unless he signed the Form B contract he could not get the orchestra. (R. 53)

The same orchestras which played the engagements that are involved herein and were booked through the use of the Form B contract had previously played at petitioners' ballrooms in engagements antedating the promulgation of the Form B contract. (R. 53, 70, 102, 311, 327, 334) The manner in which the orchestras operated and the conduct and practices of the parties were the same in the case of the engagements booked under the Form B contract as they were in the case of the engagements for petitioners prior thereto. (R. 102, 139, 253, 277, 327, 364, 365)

All of the leaders and sidemen of the orchestras involved in these actions were members in good standing of the American Federation of Musicians. (R. 653) The Form B contract contains an express provision making all of the rules, by-laws and regulations of that organization a part of the contract and it further provides that "nothing in this contract shall ever be so construed as to interfere with any obligation which they (member musicians) may owe to the American Federation of Musicians." (Par-

enthetical insertion ours). Both at the time the Form B contracts involved in these causes were made and the time the engagements specified therein were played, certain by-laws of the Federation which were previously adopted at its annual convention and officially published by its Secretary as effective for the current year contained a number of provisions obviously designed to protect the sidemen of orchestras against various practices of orchestra leaders as employers. (Interveners' Ex. 6, R. 594-599, 592, Interveners' Ex. 7, R. 540-544, 538) Many of these by-laws refer to the leader as employing the sidemen (Interveners' Ex. 6, R. 596, 598, 592, Interveners' Ex. 7, R. 541, 542, 538), and three of them expressly prohibit the sidemen from contracting with an establishment owner. (Interveners' Ex. 6, R. 596, 598, 592, Interveners' Ex. 7, R. 541, 542, 538) Oscar F. Hild, member of the union's International Executive Board, called as a witness by interveners, testified that under the powers granted him by Article I, Section 1 of the by-laws, James C. Petrillo, Federation President, took action to change these by-laws by issuing an order which he identified as a letter sent by Petrillo to all union locals, on May 1, 1941, advising them that after June 1, 1941 only the Form B contract could be used by orchestras in booking engagements. (R. 502-504, 579-582, p. 24 of Pltfs.' Ex. B-37, R. 587, 582) Article I, Section 1 of the by-laws, gives the union president power to issue an executive order which "may by its terms annul and set aside by-laws or any portion thereof." (Interveners' Ex. 7, R. 538) Although Petrillo's said letter of May 1, 1941, which was the only notice of the alleged by-law change ever given to the union locals and booking agencies (R. 590, 591), makes no mention of any by-laws and does not by its terms purport to annul and set aside any by-law or part thereof (R. 578, 579, Pltfs.' Ex. B-37, R. 587, 582), the sum and substance of the witness Hild's testimony was that he con-

sidered such letter together with the Form B contract as changing the by-laws in question. (R. 604) While Section 3 of Article I of the union's by-laws require the Secretary to publish in its official publication not later than July following adoption "all laws that have been amended, added to, or in any way changed" (Interveners' Ex. 7, R. 539, 538), the official copies of the by-laws edited and published by the Secretary in 1941 and again in 1942 contain the same verbatim by-laws as were claimed by the witness Hild to have been changed by Petrillo's said letter of May 1, 1941. (Interveners' Ex. 7, R. 541, 542, 538, Interveners' Ex. 6, R. 596, 592) In July 1944 the Secretary certified that the revision of one of these by-laws, being Section 29 of Article X, which prohibits an establishment owner from hiring the sidemen of an orchestra, was not intended to take effect until September 15, 1944. (R. 605, 606; pp. 12 and 14 of Pltfs.' Ex. B-38, R. 615, 617, 614)

The actions were tried to the court without a jury. The court on consideration of the evidence entered findings of fact (R. 662-663) as follows:

> "1. That at all times, and during the times of the performances by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control over their orchestras and the members thereof, and the method and manner of doing the work. Such leader exercised and had the exclusive right to hire and fire such members, to contract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances. Such leader organized, managed and controlled such orchestras as an independent organization for hire, and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes.
>
> "2. The contract, Form B, was not entered into by fair negotiation between the parties, but upon demand of the musician's union and the leaders of the

orchestras that it must be entered into or no orchestra could be obtained, and it was required to be so executed with the avowed purpose of protecting the leader from taxes as an employer. It was required by the leader to be entered into as an anticipatory arrangement to escape taxation. There was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestras, subsequent to June, 1941, or by reason of the Form B contract, than there was before that time, and the true relationship at all times as between the plaintiffs and such leaders was that the latter were independent contractors.

"3. At the time of the execution of the contracts, form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestras or any of the sidemen or the method or manner of doing its or their work in any particular.

"4. Considering all the facts and circumstances as disclosed by the evidence, including the contract Form B and its execution, none of the plaintiffs was at the time of the performance of the several orchestras on their premises the employer of the leader or of any of the members of the orchestras within the meaning of the Internal Revenue Statutes."

The district court on these findings concluded as a matter of law that the leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes and that none of the ballroom owners were the employers of the leader or any of the members of the orchestra within the meaning of such statutes (R. 663, 664), and accordingly entered judgments in favor of petitioners. (R. 664, 665)

After having the cases under advisement for more than

eight and one-half months from the date on which they were orally submitted, the Circuit Court of Appeals for the Eighth Circuit by a divided court reversed the judgments of district court and remanded the causes. (R. 698) The majority opinion held that the Form B contract with its provisions giving the right of control of the orchestra's services to the ballroom owners established on its face the legal relationship of employer and employee as it existed at common law. Thereupon the court further held that the evidence failed to show that it was the actual intention of the parties that such right of control should remain in the leader, and that inasmuch as the evidence did not show that the contract was subsequently abrogated by the parties, the employment relationship established by the contract remained unchanged. (R. 683-698)

Circuit Judge Gardner, who dissented, was of the opinion that the findings of the trial court, including its third finding that parties at the time of the execution of the Form B contract did not thereby intend to transfer the right of control of the orchestra's services from the leader to ballroom owners, were supported not only by substantial but abundant evidence. He took the position that the Form B contract at most was simply a circumstance to be considered in determining the relationship of the parties and did not preclude the trial court from considering other facts showing their real relationship. (R. 698-708)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

(1) In holding that petitioners were the employers of the leaders and members of the orchestras which performed engagements at petitioners' ballrooms within the meaning

of Section 1426 (b) and 1607 (c) of the Internal Revenue Code which define employment for social security and employment tax purposes.

(2) In holding that a written contract which purports to vest the right of control over the services in one of the parties conclusively establishes a relationship of employer and employee and precludes consideration of facts which clearly prove a relationship different than that ostensibly created by such contract.

(3) In substituting its findings of fact for those of the district court on the question of whether the parties actually intended that the right of control over the services of the orchestra members would be in the ballroom owners and not the leader.

(4) In holding that a person who is admittedly an employer under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act may shift to another the tax burdens imposed on him as such employer by the simple device of merely changing the wording of their written contract without any other factual change in their relationship.

(5) In holding that certain by-laws of the American Federation of Musicians recognizing the leader as the employer of his sidemen and prohibiting the existence of an employment relationship between them and the ballroom owners were not a part of the Form B contracts involved in these actions.

(6) In holding that the terms of the Form B contract were sufficient to create the relationship of employer and employee between the ballroom owners and the leaders and members of their orchestras.

SUMMARY OF ARGUMENT.

The decision of the district court that the leaders of the orchestras were independent contractors and that they, and not the ballroom owners, were the employers of the sidemen of their respective orchestras within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act was based on findings of fact which the Circuit Court of Appeals could not disturb unless clearly erroneous. A finding of fact is clearly erroneous only when it is not supported by substantial evidence or is arrived at by the application of a wrong principle of law.

The only finding of fact which the Circuit Court of Appeals set aside was the one wherein the district court found that the leaders, and not the ballroom owners, had the right of control over the members of their orchestras and the method and manner of doing the work. This finding was not arrived at by application of a wrong principle of law for two reasons, as follows:

(a) The trial court followed the well settled rule that the court in determining who, as employer, is liable for social security and employment taxes, should not confine itself to the terms of a written contract between the parties but should consider all relevant facts and circumstances which tend to show the actual and true relationship. The authorities uniformly establish that, in determining the status of parties for tax purposes, the terminology of their written contract is of little weight or consequence as compared to the actual facts showing their true relationship. The district court in applying this rule considered not only the Form B contract but also such evidentiary factors, among others, as who directed and controlled the performance of the orchestra members in the playing of

an engagement, who had the right to hire and fire such members and fix and determine the amount and manner of the payment of their compensation, whether the leader was engaged in an independent business for profit, and whether there was any change in the conduct and practices of the parties after the advent of the Form B contract. The Circuit Court of Appeals, in disregarding these factors, as well as others shown by the record to exist in the present cases, and basing its determination solely on the provisions of Form B contract purporting to fix the relationship of the parties, applied an erroneous rule of law and its decision is therefore in error and should be reversed by this court.

(b) The Form B contract was one admittedly devised for the purpose of avoiding liability for social security and employment taxes not accompanied by any change in the actual relationship of the parties. Contracts of this nature are universally condemned and disregarded by the courts.

The district court's finding of fact with respect to the right of control was supported by not only substantial but also abundant evidence consisting of facts as follows:

(1) The leaders, and not petitioners, actually exercised control of the means and manner of performance of the members of their orchestras. (2) The leaders, and not petitioners, had the exclusive right to hire and discharge the members of their orchestras. (3) The leaders, and not petitioners, determined the amount of wages of the sidemen of their orchestras and its manner of payment. (4) The leaders were each engaged in an independent business for profit. (5) The leader of each orchestra, and not petitioners, furnished the tools (except the piano) with which the work was done. (6) The parties operated in the

same manner after the adoption of the Form B contract as before. (7) Petitioners justifiably believed that the Form B contract did not change their status with respect to the orchestras. (8) No change was made in the Union by-laws made a part of the Form B contract, which by-laws clearly show that the parties intended that the orchestra leader, as an independent contractor, would be the employer of the sidemen. (9) The Form B contracts were not writings evidencing a meeting of minds of the parties arrived at through fair negotiations. (10) Petitioners had not the necessary musical knowledge and skill to direct and control the means and manner of the performance of the sidemen.

The accumulative effect of the foregoing evidence is overwhelming proof that the leaders had and exercised the right of control over the orchestra members, and the decision of the Circuit Court of Appeals setting aside the district court's finding on that question is, therefore, in error and should be reversed by this court.

The Circuit Court of Appeals erred in substituting its findings of fact for those of the district court on the question of whether the parties actually intended that the right of control over the services of the orchestra members should be in the ballroom owners and not the leader. What the parties actually intended was solely a question of fact to be determined from all the evidence and the trial court's finding on that question being supported by substantial evidence, the Circuit Court of Appeals was without the power to substitute its own contrary finding.

The Circuit Court erred in basing its decision entirely on the assumption that the terms of Form B contract had the legal effect of vesting in the ballroom owners the right to control the means and manner of the performance of the orchestra members for the reason that the contract

at most granted the ballroom owners control only over the results to be accomplished and not the details of the work and its manner of performance. Moreover the contract does not even purport to divest the leader of other characteristic controls of an employer.

ARGUMENT.

I.

To determine who, as employer, is liable for social security and employment taxes, the court should not confine itself to the terms of a written contract between the parties but should consider all relevant facts and circumstances which tend to show their actual and true relationship.

A.

In determining the status of parties for tax purposes, the terminology of their written contract is of little weight or consequence as compared to the actual facts showing their true relationship. Courts disregard terminology in a written contract which does not square with the actual facts.

Both the district court and the Circuit Court of Appeals agree that in order to constitute an employment within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and the regulations issued thereunder, the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them, and that an independent contractor is not an employee. Their point of difference arises with respect to the factors which a court may consider in determining such relationship in a case where the written

contract of the parties purports by appropriate terminology to fix their status as that of employer and employee. The trial court, following what it considered to be the rule laid down in numerous cases hereinafter mentioned, held that the contract was not conclusive of an employer-employee relationship but merely, "an element that may be considered by the fact finder if of any assistance in determining what is the true relationship." (R. 660) Circuit Judge Gardner concurs in this holding. (R. 708) The majority opinion (R. 689) takes a contrary view and holds that the parties' written contract, because it "obligationally gives complete control of the services which one person agrees to perform for another to the person for whom the work is done" establishes on its face the legal relationship of employer and employee as it existed at common law, thereby precluding a court's consideration of other factors which show that their actual relationship was that of independent contractor.

Petitioners believe this is the first case involving the performance of services by one person for another in which any court has ever held that the parties' written contract is the sole test by which the relationship of employer and employee is to be determined. This holding is directly contrary to the view taken by the American Restatement of the Law of Agency and unanimous decisions of courts which have had occasion to consider the question. Section 220 (1) of such Restatement, Volume I, page 483, defines a servant "as a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." Section 220 (2) states:

> "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered. * * *"

The section then lists *nine evidentiary factors* of which the parties' agreement respecting control over the details of the work is only one. Other facts listed as equally important are such matters as whether the person performing the services is engaged in a distinct occupation or business, the skill required in the particular occupation; the method of payment, who furnished the tools with which the work was done, and whether or not the parties believe they are creating the relationship of master and servant. These are among the very factors which the district court considered in making its findings (R. 662, 663), most of which are not even questioned by the majority opinion. That the trial court, in doing this, acted correctly is further shown by the Agency Restatement's comment on Section 220, page 484, as follows:

> "The relationship of master and servant is one not capable of exact definition. * * * *The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship.*" (Italics ours.)

The Agency Restatement's rule that the status of employer and employee is not to be judged by the single evidentiary factor of the parties' form of contract but by an overall view of all the facts and circumstances showing their true relationship is sustained by the decisions of courts in the following cases, wherein members of an orchestra were held to be the employees of the leader and not the establishment owner for social security employment tax purposes:

Spillson v. Smith, 147 F. 2d 727 (C.C.A. 7th).

Williams v. United States, 126 F. 2d 129 (C.C.A. 7th) certiorari denied, 317 U. S. 655, 63 S. Ct. 52, 87 L. Ed. 527.

Palmer v. Michigan Unemployment Compensation Commission, 310 Mich. 702, 18 N.W. 2d 83.

Nebraska National Hotel Co. v. O'Malley, 63 F. Supp. 26 (Neb.).

In re Jermyn Hotel Company, (Pa. Common Pleas, Sept. 3, 1946) C. C. H. Unemployment Ins. Service, Pa. par. 8149.

In the last two cases above cited, which involved orchestra engagements under the same Form B contract as that involved herein, the court cited with approval the decision of the district court in the present cases.

The rule applied in the foregoing orchestra cases is supported by the uniform decisions of courts in social security and unemployment tax cases generally.

Matcovich v. Anglim, 134 F. 2d 834, (C.C.A. 9th) certiorari denied, 320 U.S. 744, 64 S. Ct. 46, 88 L. Ed. 441.

Anglim v. Empire Star Mines Co., 129 F. 2d 914 (C.C.A. 9th).

Wabash R. R. Co. v. Finnegan, 67 F. Supp. 94 (E. D. Missouri).

Royal Theatre Corporation v. United States, 66 F. Supp. 301 (Kan.).

Willard Sugar Co. v. Gentsch, 59 F. Supp. 82 (N.D. Ohio).

Jack and Jill, Inc. v. Tone, 126 Conn. 114, 9 Atl. 2d 497.

In re Morton, 284 N.Y. 167, 30 N.E. 2d 369.

Industrial Commission v. Northwestern Mutual Life Ins. Co., 103 Col. 550, 88 P. 2d 560.

In the last case above cited, the Supreme Court of Colorado held that the written contracts between the defendant company and its agents would be considered a "slight element" in determining the nature of their relationship.

The rule is also sustained by the following decisions in workmen's compensation and tort cases:

Gulf Refining Co. v. Brown, 93 F. 2d 870 (C.C.A. 4th).

Bertino v. Marion Steam Shovel, 64 F. 2d 409 (C.C.A. 8th).

Sanford v. Goodridge, 234 Iowa 1036, 13 N. W. 2d 40.

Glielmi v. Netherland Dairy Company, 254 N. Y. 60, 171 N. E. 906.

Nestle's Food Co. v. Industrial Commission, 205 Wis. 467, 237 N. W. 117.

Brown v. Industrial Accident Commission, 174 Cal. 457, 163 Pac. 664.

Further support for the rule is found in the recent decision of the Seventh Circuit Court of Appeals in the case of *Hargis v. Wabash R. R. Co.*, 12 Labor Cases 70, 327 (decided January 16, 1947) where the question was whether the plaintiff was an employee of the defendant under the Fair Labor Standards Act. The district court held that he was not such an employee because he had voluntarily entered into a written contract defining his status as that of independent contractor. In reversing this holding, the Circuit Court said:

> "In *Kehrer v. Industrial Commission*, 365 Ill. 585, the court said:
>
> > 'It is impossible * * * to lay down a rule by which the status of men working and contracting together can be accurately defined in all cases as employee or independent contractors. Each case must depend on its own facts and ordinarily no one feature of the relation is determinative but all must be considered together.'
>
> "Certainly the nature of the relationship cannot be determined alone by the use of the term 'independent contractor' in the agreement of the parties. If it could employers might in many cases easily escape the re-

sponsibility imposed upon them by employer liability acts through the simple device of requiring each employee to enter into a contract such as that used in this case. • • •

"Tested by the ordinary common law rules, we think the court should not have held, merely because of the language of the written instrument, that the relationship between Hargis and the Wabash Railroad was that of independent contractor and not that of employer and employee."

While this court has not previously had occasion to apply the rule in a social security tax case, it has repeatedly held that in tax matters generally a trial court may disregard the terminology of the parties' written contract and base findings on circumstantial evidence showing the substance of the transaction or relationship to be different from that portrayed in such contract.

Commissioner v. Tower, 327 U.S. 280, 66 S. Ct. 532, 90 L. Ed. Adv. Ops. 559.

Moline Properties, Inc. v. Commissioner, 319 U. S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499.

Griffiths v. Commissioner, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319.

While it so happens that in each of the above cases the rule was applied in favor of the government, there is nothing in the court's opinion to indicate that the rule is so limited, and in *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755, this court did not hesitate to apply the same rule in favor of the taxpayer.

The Treasury Department, through the regulations and rulings of the Commissioner of Internal Revenue promulgated under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, has itself repeatedly recognized the rule so universally recognized by the foregoing authorities and applied by the trial court in the pres-

ent cases. Section 402.204 of the Commissioner's Regulations 106 relating to the former enactment and Section 403.204 of his Regulations 107 relating to the latter enactment each state:

> "Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.
>
> "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent or independent contractor."

It is clear from the above regulation that if, as the district court found, the relationship of employer and employee existed in fact between the leader and the sidemen of each of the orchestras in the present case, it is wholly immaterial that the Form B contract designates and describes such relationship as that of fellow employee.

In S.S.T. 336 (C.B.1938-2, 295) the Bureau of Internal Revenue again referred to the same rule in language as follows:

> "The fact that a contract of employment provides that individuals engaged by an employee to assist him in the performance of his duties shall be his employees and not those of his employer *is not conclusive in determining the status of such individuals under the taxing provisions of the Social Security Act.* Such a provision ordinarily has no greater effect than a general provision contained in many contracts describing the relationship of the parties as something other than that of employer and employee although such relationship actually exists." (Italics supplied)

Singularly enough, the Bureau has even actually had occasion to apply the rule in determining the relationship between a leader and the members of his orchestra and the

establishment owner purchasing its services. This clearly appears from the Bureau's statement in S.S.T. 375 (C.B. 1939-2, 280) dealing with the social security tax status of B, an orchestra leader, and the musicians engaged by him, as follows:

> "The reference made in the contracts to the 'purchaser' as the 'employer' does not affect the situation and the *true relationship must be determined in the light of all the facts.*" (Italics supplied)

Finally, the Treasury Department has now conceded that the Form B contract's provisions are not conclusive of the relationship of the parties in the present cases. This clearly appears from the statement on page 8 of the Collector's brief in opposition to petition for writs of certiorari, as follows:

> "Although contractual provisions, such as are here involved may, unless 'abrogated' within the meaning of the law of contracts, be binding on the parties, we do not believe that the criterion is necessarily the same so far as the Government or a third party is concerned. The Government may treat such a contract as prima facie controlling, even if not conclusive, and it is certainly a fact to be taken into consideration along with other factors in reaching a decision."

If the parties' contract is not conclusive, but merely "a fact to be taken into consideration along with other factors in reaching a decision", in a case where the government claims that the contract is not determinative of a relationship for tax purposes, sound logic requires the application of the same rule in the converse situation, i.e., where one of the contracting parties claims as against the government that the contract is not decisive of a relationship for tax purposes. This is true because what Congress, in enacting the Federal Insurance Contributions and Federal Unemployment Tax Acts, has ordered taxed is the relationship of employer and employee in fact and its mandate

is binding on the government and private parties alike and hence cannot be changed by a mere form of contract. This is precisely the reason which prompted the Third Circuit Court of Appeals in *Tex-Penn Oil Co. v. Commissioner*, 83 F. 2d 518, to hold that a party to a contract reciting it had received $350,000 cash from the other contracting party as consideration for the transfer of corporate assets could show that the payment was not such consideration in fact notwithstanding the Commissioner's contention that the contract was conclusive. The court on this point said:

> "' * * the rule is well settled that in determining tax liability tax authorities must look through form to fact and substance."

On appeal to this court the decision of the Circuit Court in the above case was affirmed. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 57 S. Ct. 569, 81 L. Ed. 755. After quoting the finding of the Board of Tax Appeals on the consideration question, this court said:

> "The validity of the ultimate finding above quoted is to be tested by what in fact was done rather than by the mere form of words used in the writings employed. *United States v. Phellis*, 257 U. S. 156, 168, 66 L. Ed. 180, 182, 42 S. Ct. 63; *Curran v. Commissioner of Internal Revenue*, (C.C.A. 8th) 49 F. 2d 129, 131."

Other decisions applying the same rule in favor of a taxpayer and against the Commissioner in social security and income tax cases are as follows:

Anglim v. Empire Star Mines Co., supra.

Spillson v. Smith, supra.

American Crystal Sugar Co. v. Nicholas, 124 F. 2d 477 (C.C.A. 10th).

Curran v. Commissioner, 49 F. 2d 129 (C.C.A. 8th).

United States v. Title Guarantee & Trust Co., 133 F. 2d 990 (C.C.A. 6th).

Circuit Judge Gardner, who wrote the dissenting opinion, concluded that the rule so universally sustained by the authorities was directly applicable to the present cases. In this connection he said (R. 701, 702):

> "The government, to be sure, was not a party to this contract, and if it did not in fact create or change the relationship of the parties it should not be of controlling effect. The trial court took it into consideration together with all the evidence and circumstances and found that it did not change the relationship of the parties as it had theretofore existed, and that the orchestra leaders were the employers of the musicians, and were independent contractors so far as the ballroom owners were concerned. None of the sidemen or musicians, aside from the leaders, executed any of the contracts, and the contract terms designating or giving appellation to a relationship in form created by them, are not in any sense conclusive. Parties can not by the use of legal terms make impotent the legislative arm of the government. The actual facts, not the names or terminology employed, must govern. (citing cases) • • • This principle or rule is particularly pertinent in tax matters. Taxation is a practical matter dealing with realities and the power of taxation is not to be restricted by mere legal fictions, but substance rather than form controls in applying tax laws." (Parenthetical insertion ours)

The majority opinion, while recognizing the general rule announced in the foregoing cases, holds that it is limited only to contracts containing general recitals and descriptive references and does not apply to a contract containing express obligations. (R. 691, 692) There is no foundation whatever for this novel view of the limited scope of the rule. In the first place, neither the Restatement of the Law of Agency nor any of the decisions sustaining the rule make any such distinction. In the second place, many of these decisions were in cases involving contracts which, in addition to containing general recitals and descriptive references, also contained clauses creating express obliga-

tions. For example, in *Spillson v. Smith, supra,* where the question was whether an establishment owner was the employer for social security tax purposes of an orchestra performing engagements under an earlier form of union contract, such contract provided that the establishment owner "was the employer to whom the musicians were directly responsible" and "any payment by the employer to the musicians' representative shall be as their agent for distribution among them." The lower court, like the district court in the present cases, refused to regard the written contract of the parties as conclusive, and upon examination of the actual facts found that the leader and not the establishment owner, was the employer of the members of the orchestra. On appeal, the Seventh Circuit Court of Appeals affirmed, saying:

> "The law is well established that the employer-employee relationship is to be judged by the presence or absence of no single evidentiary factor, but by an overall view, *Anglim v. Empire Star Mines Co.*, 9 Cir., 129 F. 2d 914, 917."

In *Anglim v. Empire Star Mines Co. Ltd., supra,* the question was whether miners performing services for a mine owner under a written lease agreement were employees of the latter for social security tax purposes. This agreement gave the owner the right to inspect the work, the right to require the discharge of objectionable workmen, and the right to furnish the tools with which the work was done. The court, after examining the conduct of the parties in practice, held that the miners were not the employees of the mine owner notwithstanding the provisions of the written lease.

Matcovich v. Anglim, supra, involved a contract reciting that so called "licensees" were not employees and were not subject to the control of the licensor. The district court held that, notwithstanding these recitals, the so-called

"licensor" had the right of control. On appeal this holding was affirmed.

In *Royal Theatre Corporation v. United States, supra,* the plaintiff corporations sought to fix their relationship with one Fite by a contract which expressly provided that the corporations should have no control over Fite with respect to his time or activities and that he was not to be an employee of the corporations. In refusing to treat such contract as decisive of the relationship, the court said:

> "The usual criteria for determination of the existence of the employer-employee relationship may become of slight assistance when the taxpayer shrouds that relationship in a cloak of artifice and fiction. Before such tests can be applied, the cloak must be removed and the subject viewed in naked reality. Contractual fictions, like the corporate form, may be subjected to the penetration of thorough judicial inquiry."

Similarly, in at least five other cases cited above, *Gulf Refining Co. v. Brown, Willard Sugar Company v. Gentsch, Wabash R. R. Co. v. Finnegan, Nebraska National Hotel Co. v. O'Malley,* and *In re Jermyn Hotel Company,* the contract between the parties contained an express provision dealing specifically with the right of control over the services rendered. Yet in each case the court went beyond the contract and determined the true relationship on the basis of all the facts and circumstances showing who in fact had the right of control over the work being done.

In *Williams v. United States, supra,* the Seventh Circuit Court pointed out that while the orchestra contracts were some evidence that Williams was not the employer, "they too, however, must give away to more decisive and persuasive circumstances." The court then enumerated the additional "decisive and persuasive circumstances" which a court may take into account in determining who has the

right of control over an orchestra's services. The court said:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work (*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *Densby v. Bartlett*, 318 Ill. 616, 149 N.E. 591, 42 A.L.R. 1406), the method and determination of the amount of the payment of the workmen (*Simonton v. Morton*, 275 Pa. 562, 119 A. 732), whether or not the person doing the work is engaged in an independent business or enterprise and, particularly, whether he stands to make a profit on the work of those working under him (*Barnes v. Myers*, 163 Md. 206, 161 A. 279, *Petzold v. McGregor*, 92 Ind. App. 528, 176 N.E. 640), which party furnishes the tools or materials with which the work is done (*Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440), and who has control of the premises where the work is done. *Murphy v. Herold Co.*, 137 Wis. 609, 119 N.W. 294."

Petitioners here point out that the five factors above mentioned by the Seventh Circuit Court of Appeals are the very factors to which the trial court in the present cases gave consideration, and with respect to all but one of them (control of the premises where the work was done) it found in favor of petitioners in findings which are not questioned by the court below. Surely it cannot be the law that these factors cease to have a bearing on the right to control simply because the parties attempt through the use of legalistic fiction in a form of written contract to define who, as between them, possesses such right. Take for example the right to hire and discharge the workmen. The Seventh Circuit Court of Appeals, at a later point in its opinion in the *Williams* case (p. 133 of 126 F. 2d), speaking of this right, said:

> "It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer * * * Without this right there could be no effective control by an employer."

Does this right to hire and discharge in one person suddenly lose its potency as affecting the right of control in that person simply because a form of contract purports to place such control in someone else? A realistic view of the situation in the present cases requires that this question be answered in the negative. It was only through the exercise of this power to hire and fire, which the trial court on undisputed evidence found the leader possessed, that the latter could enforce his right to control the sidemen in the discipline, coordination of effort and standardization of performance necessary to produce a marketable musical entertainment which was what the leader was in business to sell. The possession of such power was just as real and vital to his right of control after the Form B contract as it was before. The same thing is true with respect to the other factors such as the right to fix, determine and pay the wages of the sidemen, the fact that the leader was engaged in an independent business for profit and furnished the tools with which the work was done. The majority opinion, as Judge Gardner in his dissenting opinion points out, "brushes aside the findings of the trial court" regarding these matters "and bases its conclusion upon the single fact that there was in form a contract which purported to fix the relationship of the parties." (R. 708) Under the unanimous view of the authorities, this was clearly error on the part of the Circuit Court warranting reversal of its decision by this court.

B.

Contracts devised for the purpose of avoiding liability for social security and employment taxes not accompanied by a change in the actual relationship of the parties are condemned and disregarded by the courts.

The district court found that the execution of the Form B contract was devised by the musicians' union with the avowed purpose of protecting the leader from taxes as an employer and that "it was required by the leader to be entered into as an anticipatory arrangement to escape taxation." (R. 663) Before considering the Circuit Court's holding on this phase of the cases, we now direct attention to the abundant evidence supporting this finding.

The case of *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th), was commenced on May 15, 1940. While this litigation was in progress the American Federation of Musicians spent many weeks in the preparation of a new standard form of contract known in this record as the Form B contract (Pltfs' Ex. B-37, R. 583, 582) from which it may be inferred that the Federation was anticipating an adverse decision in the *Williams* case. On May 1, 1941, a copy of this new Form B contract was sent to each local of that union, along with a letter from James C. Petrillo, President of the Federation, stating that it must be used on all engagements on and after June 1, 1941, "for the purpose of protecting our members under the Social Security Laws." (See p. 24 of Pltfs' Ex. B-37, R. 587, 582) An order of the International Executive Board instructing officers of locals and members regarding its use further states: "All officers of locals and all members are required to adhere strictly to this order, as this is the only means by which we can help protect the interest of the members under

the Social Security Laws of the United States." (R. 582, Pltfs' Ex. B-37, R. 587, 582) That an anticipatory arrangement in the form of a written contract for the purpose of relieving leaders from the burden of paying social security taxes on wages paid by them to their sidemen was what the Executive Board of the Union had in mind in using the above quoted language is made unmistakably plain by President Petrillo's statement on page 18 of the May 1941 issue of the International Musician, the Union's official journal, as follows:

> "In accordance with these conclusions all members of the American Federation of Musicians are herewith instructed that, at the expiration of their present contracts with hotels, cafes, restaurants, etc. this standardized form contract be accepted and put in force, and from then on the contractor or leader will not be held responsible for the payment of social security tax on such engagements." (Pltfs' Ex. B-37, 585, 582)

During the time when the Union's counsel was drafting the Form B contract there were three conferences between the Union's counsel and Petrillo and Treasury Department attorneys regarding the terms and provisions of that contract and the subject generally of "who was to be recognized as employer." (R. 575, 577, 578)

Petitioners here point out that other trial courts, presented with a like record of like purpose of a standard form of musician's union contract have made the same finding as did the district court in the instant cases. Judge Donohoe in *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Neb.), found that "the Form B contract was obviously entered into in an effort to shift the legal responsibilities imposed by the statutes . . . " (See Findings of Fact filed November 13, 1945). And in *Spillson v. Smith*, (N. D. Ind.) C.C.H. Unemployment Insurance Service, Vol. I, Par. 9111, affirmed 147 F. 2d 727 (C.C.A. 7th) wherein were involved the same facts as those in the pres-

ent case, except that the contract which was passed on was the form of contract devised by the American Federation of Musicians just preceding the Form B, the district court found that:

> "* * * it was apparent that the contract admitted in evidence and marked Plaintiff's Exhibit B, which was a printed form and prepared by the union, and was the standard form of contract provided by the union, was changed from the terminology used in the contract identified as Plaintiff's Exhibit "A" in an obvious effort to avoid liability on the part of the orchestra leaders for the payment of Social Security and Employment taxes."

The record in the present cases further shows that all of the orchestras had played engagements at petitioners' ballrooms prior to the Form B contract, (R. 53, 70, 311) and that every one of the leaders who testified stated that there was no difference or change in their relationships with the petitioners or in their manner of performance of the engagements after Form B contract came into use from that which existed prior to the Petrillo edict requiring the use of such contract. (R. 139, 253, 277, 364, 365, 392, 393, 397) The petitioners each testified to like effect. (R. 67, 102, 327) No witness for defendant or intervenors controverted that testimony or claimed in any manner that there was a single change in actual practices resulting from the use of the Form B contract, and the Collector, with commendable frankness, has admitted in his brief (p. 6) in opposition to the petition for writ of certiorari that "the subsequently established record in this case indicated that the new contract did not in fact result in any change in the conduct of the business, or the exercise of actual control over the musicians exclusively by the leader."

Wherever the evidence establishes motivation for a contract like or similar to that provided by the record in this case, and the conduct of the parties after such contract

remained unchanged from what it was before, the courts have made short shrift of contentions that such a contract is conclusive proof of the true relationship of the parties. This court rejected just such a contention in *Commissioner v. Tower*, 327 U. S. 280, 66 S. Ct. 532, 90 L. Ed. Adv. Ops. 559, where the question was whether a written agreement was conclusive evidence of a partnership relation between a husband and wife for income tax purposes. This court, speaking through Mr. Justice Black, said:

> "Before the partnership the husband managed, controlled, and did a good deal of the work involved in running the business, and he had funds at his disposal which he either used in the business or expended for family purposes. The wife did not contribute her services to the business and received money from her husband for her own and family expenses. After the partnership was formed the husband continued to control and manage the business exactly as he had before. The wife again took no part in the management or operation of the business. * * * Consequently the result of the partnership was a mere paper reallocation of income among the family members. The actualities of their relation to the income did not change. There was, thus, more than ample evidence to support the Tax Court's finding that no genuine union for partnership business purpose was ever intended and that the husband earned the income."

An earlier case by this court laying down the same general rule and one strongly relied on by the district court in the present cases, is *Griffiths v. Commissioner*, 308 U. S. 355, 60 S. Ct. 277, 84 L. Ed. 319, wherein this court found that "a lawyer's ingenuity devised a technically elegant arrangement whereby an intricate outward appearance was given to the simple sale from Griffiths to Lay and the passage of money from Lay to Griffiths." Similarly, the history of the Form B contract and the unchanged conduct of the parties under it unmistakably stamp that contract as a "technically elegant arrangement" ingeniously devised to

give an outward appearance of employer and employee relationship to what is in fact an independent contractor relationship. This court's statement in the *Griffiths* case that "Taxes cannot be escaped by anticipatory arrangements and contracts however skillfully devised" is equally applicable in the cases at bar and the district court properly so held.

In *Doll v. Commissioner*, 149 F. 2d 239, which was a family partnership case, the Eighth Circuit Court laid down the same rule as this court in the *Tower* case. Speaking through Judge Stone, the court said:

> "We have here a written instrument which is sufficient to create a partnership, both at common law and under Missouri decisions. *Schneider v. Schneider*, 347 Mo. 102, 146 S. W. 2d 584; *Stone v. Guth*, 232 Mo. App. 217, 102 S. W. 2d 738. The judgment here is at most an adjudication of what was never in doubt. The existence of such a contract is not determinative of this tax issue. There remains the impact of the test of an analysis of 'all the circumstances attendant on its creation and operation.'".

After reviewing "all the circumstances attendant on its creation and operation", Judge Stone concluded his opinion as follows:

> "The manner of operation of his business preceding and during the years of this contract was consistent with a conclusion that this contract did not make any substantial change in his (this petitioner's) economic position."

The court's attention is directed to the fact that Circuit Judge Gardner was of the opinion that the rule announced by the court in the *Doll* case was equally applicable to the cases at bar. (R. 704)

The same application of the rule in question has been made in social security and employment tax cases. One of the most recent of such cases is *Tomlin v. United States*,

(N. D. Cal. January 2, 1947) C.C.H. Unemployment Insurance Service, Vol. I, Par. 9280, where the question was whether supervisors performing services pertaining to the distribution and operation of plaintiff's vending machines were its employees for social security and employment tax purposes. Plaintiff contended that such supervisors were independent contractors because of their execution of certain lease agreements drawn up by an attorney for the express purpose of giving them that status. The court in denying this contention pointed out that "subsequent to the signing of these agreements, the signatory parties continued functioning the same as before." It therefore characterized the lease agreement as an "attempt to arbitrarily create a status which in fact was non-existent."

In *McDermott v. Henrickson*, 45 F. Supp. 277 (S. D. Wash.) the owner of a barbershop attempted to create, through the execution of written leases with barbers working in his shop, the relationship of landlord and tenant. In holding this attempt ineffectual, the court said:

> *"The subleases prepared by plaintiff disclose much legal ingenuity and acumen.* * * *
>
> "However, in the court's opinion his ingenuity, ability and study cannot convert what was in fact employment to subtenancies and independent business. It is not the form but the substance which controls.
>
> "What was originally employment and so intended and admitted by plaintiff and the barbers cannot be completely altered into something else by a mere matter of nomenclature. There is no substantial difference between the actual terms and conditions of employment during the period plaintiff admits the barbers were employees and the actualities under the so-called subleases except with regards to the names used and the alleged time required for terminating the relationship." (Italics supplied)

In *Electrolux Corporation v. Board of Review*, 129 N. J. L. 154, 28 A. 2d 207, where it appeared that the parties' contract had been changed without any change in the factual relationship, the court said:

> "It is conceded that the writing was designed to remove appellant's salesmen from the category of employees governed by the Unemployment Compensation Act, supra. But it was ineffectual as such. * * * There were provisions obviously intended to invest them with the status of independent contractors. *Yet the change was of the form rather than the substance so far as control was concerned—one whose sole motivation was evasion of the cited statute without an alteration of the essence of the relationship.*" (Italics supplied)

The Circuit Court majority opinion admits that prior to the Form B contract "a leader had been held to be an independent contractor and to be liable for the payment of Social Security Taxes on his orchestra-members." (R. 688) As above stated, the undisputed record evidence shows, and the collector has now admitted, that, except for the change in the form of the contract, the facts and circumstances relating to the orchestras and their engagements booked under the Form B contract were the same as before that contract was devised. The correctness of the majority opinion must therefore stand or fall on the bare proposition that even though there was no material factual difference in the true relationship of the parties, the mere existence of a written contract skillfully and adroitly devised to cause a shifting of a tax burden, without any change in the actual relationship of the parties, requires a court to conclude that a new and different taxpayer is the employer. That is exactly what the courts have consistently refused to do, and, as said by the court in the *McDermott* case, supra, an original relationship once established "cannot be completely altered into something else by a mere matter of nomenclature."

1. *The Reasons Given by the Circuit Court for Its Holding That the District Court Could Not Disregard the Form B Contract as a Tax Avoidance Device Are Not Sustained by Either the Facts or Applicable Rules of Law.*

Nothing contained in the majority opinion of the court below indicates that it gave any consideration whatever to the rule of the cases last above cited or the facts of this record which bring the Form B contract squarely within it. The opinion, while admitting that the purpose of the contract "was to shift as nearly as possible the social security tax burden previously borne by a leader on his orchestra-members to those engaging the services of the orchestra" (R. 687), nevertheless holds that the trial court was not on that account entitled to disregard the provision therein respecting control of the orchestra's services. The first reason given by the court, that the contract does not operate to deprive the government of any taxes which it would otherwise have received, is refuted by at least two undisputed record facts, the first of which is that the orchestras in the cases at bar, like all traveling orchestras, play many engagements for civic, charitable, educational and similar organizations. (R. 71, 127, 162, 163, 259, 330, 331, 442) If these organizations, and not the leaders, are held to be the employer of the sidemen of the orchestra (which would be the result under the decision of the court below), not one penny of social security and employment tax will be paid on the sums paid the sidemen performing such engagements for the reason that Sections 1426 (b) (8) and (b) (10), Sections 1607 (c) (8), (c) (10), and 101 (6), (7), (8), and (9) of the Internal Revenue Code expressly exclude charitable and educational institutions and pleasure, business and civic clubs from coverage under the Federal Insurance Contributions and Federal Unemployment Tax Acts.

The second fact to which petitioners have reference is the fact that in the present case the only three leaders who ever bothered to furnish the ballroom owners any listing of the sidemen and their pay on the reverse side of their Form B contract, as required by its terms, each misstated and understated the actual compensation of the sidemen. While the filled-in amounts on the reverse side of Paul Moorhead's contracts (Pltfs.' Exs. B-6 to B-24, both incl., R. 177-251, 176) and on the reverse side of Al Menke's contract (Pltfs.' Ex. B, R. 145-147, 140) correspond to the minimum local union scale (R. 325), each of these leaders, at the time the engagements booked by these contracts were played, was paying his sidemen above union scale. (R. 258, 136) While one of Blue Barron's contracts lists $10.00 as one evening's wages for a sideman (Pltfs.' Ex. B-34, R. 303-305, 290), this leader was paying his men a salary of $150.00 per week. (R. 326) Since the ballroom owners had nothing to do with fixing the pay of these sidemen (R. 75, 98, 325, 326), and did not know and had no way of determining the amount thereof (R. 65 and 73), it logically follows that if they, as the employer, are required to return the social security taxes thereon, the only amounts they can report as wages for that purpose are the sums listed by the leader or his booking agent on the contract, which means that the actual amounts paid by the leader in excess of such sums will entirely escape taxation. What happened in these three instances in the cases at bar will again happen countless times if the leader is relieved from his liability as an employer to return and directly pay to the government the tax on the actual wages which he pays the sidemen of his orchestra. This is so for one reason, among others, that it is utterly impossible for a leader to state in advance how much pay each musician will receive for a single night's work when the leader pays weekly salaries and usually doesn't know

exactly how many nights in any week that his orchestra will play. The foregoing facts alone furnish ample support for the trial court's finding that the Form B contract was an anticipatory device to enable the leader to escape taxation.

The second reason given by the majority opinion is that "if the legal relationship of employer and employee was created between the ballroom operators and the orchestra members, as it was here in the circumstances of the negotiation and execution of the contract, and that relationship had not thereafter been abrogated, the ballroom operators were simply bearing the burden of the taxes which the statute imposes upon anyone who occupies an employer's status." The opinion does not state what these "circumstances of the negotiation and execution of the contract" were, but at most they constituted merely evidence conflicting with the substantial evidence on which the trial court based its third finding that the parties at the time of the execution of the Form B contract did not thereby intend to transfer the right of control over the sidemen and their work from the leaders to the ballroom owners. The voluminous record facts making up this substantial evidence are reviewed on pages 89 and 90 of this brief and need not be repeated here.

Moreover, the reasoning of the court is erroneous because it assumes that the creation of an employer and employee relationship is to be determined solely from the circumstances of the negotiation and the execution of the contract without taking into account the all-important fact as to whether or not there was any actual change in the conduct of the parties after the contract from what it was before. The authorities cited earlier herein uniformly hold that where the sole motivation for a contract is tax avoidance without any change in the actualities of the relationship a court should disregard such contract and determine

their status from the substance, rather than the form of their relationship.

The third reason given by the majority opinion is that the Commissioner of Internal Revenue, if he so chose, "could have insisted that the leader should pay social security taxes on his orchestra members all the way down the line "including those arising out of the brief engagements for the petitioners," but "this would not help the ballroom operators here" because "the right to make the choice in such an alternative situation is the Commissioner's, and a taxpayer who has a legal liability for the tax cannot complain of the choice." (R. 694, 695) Petitioners submit that this third reason is as equally untenable as the other two given by the court. First, because it clearly begs the question inasmuch as it assumes the very fact at issue, namely, whether the taxpayer has a legal liability for the tax. Second, it incorporates a rule of law which would tax a person as an employer not on the basis of who the statute says is the employer but who the Commissioner of Internal Revenue, in his arbitrary, capricious or wise determination, says is the employer. Circuit Judge Gardner, in his dissenting opinion (R. 708) pointed out the inherent unsoundness of such a rule when he said:

> "What Congress has commanded to be taxed must be taxed. Here the statute taxes employment and nothing else. Both the Commissioner and the taxpayer are subject to the statute and cannot by adopting a fiction of the parties shift the burden of tax from those upon whom Congress has placed it."

That Judge Gardner, and not the majority opinion, correctly states the rule of law applicable to the present cases is clearly shown by the concise language of the Third Circuit Court of Appeals in *Tex-Penn Oil Co. v. Commissioner*, 83 F. 2d 518 (affirmed by this court in 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755), as follows:

> " . . . the rule is well settled that in determining tax liability, tax authorities must look through form to fact and substance."

Finally, the rule announced by the majority opinion would violate a fundamental principle of our judicial system and that is that every person on whom liability is sought to be imposed is entitled to his day in court. The countless cases in which the Commissioner's determination of tax liability has been reversed by the courts readily demonstrates that his judgment is not infallible. Under the Circuit Court's rule, a person, with no opportunity for a judicial determination, could have an employment tax imposed on him by a ruling of the Commissioner based on a consideration of only a few of the pertinent facts and made as the result of ex parte conferences with representatives of a powerful "pressure group" interested solely in shifting the burden of such a tax from their employer members while still permitting them to retain all of the benefits of an employer status on which Congress has imposed the tax. For thoroughly convincing proof of the likelihood of just such a situation occurring under such a rule, one need not go beyond the record of what actually happened in the cases at bar.

As pointed out earlier in this brief, during the time the union's counsel was drafting the Form B contract there were at least three conferences between such counsel and Petrillo and the Treasury Department's attorneys regarding the terms and provisions of that contract and the subject generally of "who was to be recognized as employer." (R. 575, 577, 578) Those were ex parte conferences at which no representatives of the nation's many thousand ballroom operators, or of the movie industry or the radio industry or of the theatre and entertainment world were present. (R. 619) The record further shows that on February 20, 1941, long before the union membership was advised

of its existence, James C. Petrillo, the Union President, submitted it, without reference to any other material fact, to the Commissioner of Internal Revenue with a request for a ruling. (Page 18 of Plaintiffs' Ex. B-37, R. 585, 582)

The Form B contract was not promulgated until the May 1941 issue of The International Musician and the order requiring all the amusement and entertainment world to use it in the booking of orchestra engagements did not go into effect until June 1, 1941. (Page 21 of Plaintiffs' Ex. B-37, R. 587, 582)

The Commissioner's ruling which set the stage for the avalanche of litigation of which the cases at bar are typical and fixed the Department's position on all orchestra engagements in connection with which the Form B contract was used was addressed to an orchestra leader and bore date of April 12, 1941. This ruling said:

> "Upon the basis of the terms of the contract it is clear that the hotel has the right to exercise over you and the musicians performing under your direction the control and direction prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. It is therefore held that you and the other members of the orchestra are employees of the Stevens Hotel for purposes of the taxes in question." (Page 18 of Plaintiffs' Ex. B-37, R. 585, 582)

At the very time when Mr. Petrillo's letter requesting a ruling on the basis of the *bare* contract was received there was in effect a ruling of the Treasury Department containing an express requirement that every request for a ruling regarding the status of orchestra members for social security tax purposes must be accompanied by eight different items of fact information *in addition to the form of contract*. The required *additional* information had to do with the manner of performance of engagements, the orchestra's origin, its personnel, and "who has the right

to select, control, fix the compensation of, and discharge the members of the orchestra." Mim. 4797, June 22, 1938. These matters, it is to be noted; are the very facts which the district court, in company with courts everywhere, held should be considered together in determining the relationship of parties for social security and employment tax purposes.

It thus affirmatively appears that the Commissioner's choice in the present cases was made after hearing only one side of the story from a very much interested party and without even considering the very facts which his own administrative rules ordinarily required be submitted as relevant information for his guidance in rendering rulings in orchestra cases. To deny a person the right to complain of such a choice, as the court below held, not only amounts to the rankest kind of "taxation without representation" in the first instance but in addition forecloses him from thereafter ever contesting the validity of the same in the courts. These shocking implications of the majority opinion rule apparently caused even counsel for the Commissioner to doubt the wisdom thereof for on page 7 of the Collector's brief in opposition to the petition for writs of certiorari, he states:

> "*Perhaps* when, as here, the tax incidence is merely transferred, the case is to be treated as no different from a private lawful transfer of tax burden after payment." (Italics supplied.)

Because of the foregoing reason as well as the first two stated, petitioners are confident that such a manifestly unfair and unjust rule will not be approved by this court.

II.

The record facts abundantly support the district court's finding of fact that the leaders, and not petitioners, had the right to control the manner and means of the performance of the sidemen in their orchestras.

A.

A district court's finding of fact supported by substantial evidence cannot be disturbed.

The district court in its Finding No. 1 found that the leaders, and not the petitioners, had the right of control over the members of their orchestras and the method and manner of doing the work. (R. 662, 663) That court also found in Finding No. 3 that the parties did not at the time of the execution of the Form B contracts thereby intend to transfer such right of control from the leaders to the ballroom operators. (R. 663) Obviously this finding supplements and sustains Finding No. 1. Consequently much of the record evidence hereinafter reviewed in support of the latter finding also supports Finding No. 3, and we shall, therefore, treat both findings as the equivalent of one finding with respect to who as between the leader and the petitioners had the right to control the means and manner of the performance of the sidemen of the orchestra.

Under the well settled rule of this court, the foregoing findings were presumptively correct and could not be disturbed by the Circuit Court of Appeals unless clearly erroneous. *McCaughn v. Real Estate Land Title & T. Co.*, 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879, and *Adamson v. Gilliland*, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356. Rule 52 (a), Rules of Civil Procedure. And as Circuit Judge Gardner pointed out in his dissenting opinion, "a finding

of fact is clearly erroneous only when it is not supported by substantial evidence, or is arrived at by the application of a wrong principle of law." (R. 700) Having devoted the first main brief point of our argument to the proposition that the findings of the district court were not arrived at by the application of a wrong principle of law, we now consider whether the findings of fact with respect to the right of control are supported by substantial evidence.

Substantial evidence requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National L. R. Bd.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126. In determining whether there is substantial evidence to support the findings of fact of the trial court, this court must consider the evidence most favorably to the party prevailing in that court, and when the evidence is open to "diverging inferences", the question as to which inference should be drawn is for the trial court and not the Court of Appeals. *United States v. Jefferson Elec. Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.

Petitioners now review the record facts which petitioners submit constitute not only substantial but also abundant evidence that the leaders, and not the ballroom owners, had the right to control the means and manner of performance of the sidemen of their orchestras.

B.

The following record facts abundantly support the district court's finding with respect to the right of control.

1. *The leaders, and not petitioners, actually exercised control of the means and manner of performance of the members of their orchestras.*

One of the findings of the District Court which, in the words of Circuit Judge Gardner (R. 708), the majority opinion "brushes aside" is the finding "that at all times, and during the times of the performance by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work." (R. 662)

The undisputed record supporting this finding shows that petitioners were concerned only with getting an orchestra in each instance whose reputation and distinctive style of music would attract patrons to their ballrooms and please them while they were there. (R. 313) Petitioners selected each of the orchestras because they believed it had such reputation and distinctive style of music and they relied upon the leader thereof to furnish an orchestra which in its performance would measure up to its reputation and produce the distinctive style of music which petitioners wanted for the enjoyment of their dance patrons. (R. 54, 74, 313) Petitioners were not concerned with the details and manner of the work, but only with the result. The special quality of the music produced by orchestras such as those in the present cases depends principally on the ability of the individual musicians, the instrumentation, the selections played and the manner of leadership. Every

single one of these factors was controlled by the leaders of each orchestra involved herein and not by the petitioners. (R. 55, 56, 73, 315, 319)

It was the leader, and not petitioners who determined what instruments should be played in the orchestra. (R. 56, 133, 165, 275, 352) It was the leader, and not petitioners who selected, paid for and compiled the music library of arrangements from which the dance pieces were played. (R. 58, 133, 165, 271, 272, 350) It was the leader who rehearsed the members in an attempt to produce the style of music he desired the orchestra to play. (R. 132, 165, 166, 276, 355, 356) Moreover, it was the leader who determined the particular selections and the order in which they should be played at any given performance. (R. 58, 133, 165, 272, 350) Griff Williams' testimony that Roy Bartels told him to mix up the selections was denied by Bartels (R. 58), and Paul Moorhead's testimony that Larry Geer told him to play a waltz every hour was denied by Mr. Geer. (R. 315). These were the only instances in which any leader claimed petitioners gave any instructions. Of even more importance, it was the leader, in the case of each orchestra, who directed its tempo, volume and style of music and told the members when to begin and when to stop. (R. 55, 56, 73, 275, 320, 321, 353-355) The record is undisputed that petitioners did not exert any control whatever with respect to any of these matters (R. 108, 315, 319) and the collector has conceded in his brief (p. 6) in opposition to the petition for writs of certiorari that such was the fact.

The Circuit Court's decision that the District Court erred in concluding from the above described practice of the parties that the leader had the right to control the details and manner of the performance of the orchestra members, notwithstanding whatever provision purporting to cover such right was contained in the Form B contract, is directly

controverted by the numerous holdings of courts which have determined the right of control over the details of the work to be in one of the parties, not from what they said about such right in their written contract, but from what they did under it. *Gulf Refining Co. v. Brown*, 93 F. 2d 870 (C. C. A. 4th); *Matcovich v. Anglim*, 134 F. 2d 834 (C. C. A. 9th) certiorari denied, 320 U. S. 744, 64 S. Ct. 46, 88 L. Ed. 441; *Sanford v. Goodridge*, 234 Iowa, 1036, 13 N. W. 2d 40; *Willard Sugar Co. v. Gentsch*, 59 F. Supp. 82 (N. D. Ohio); *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Neb.); *Wabash R. R. Co. v. Finnegan*, 67 F. Supp. 94 (E. D. Mo.); *Royal Theatre Corporation v. United States*, 66 F. Supp. 301 (Kan.).

In *Gulf Refining Co. v. Brown, supra*, the defendant company, by an express provision in a written contract, sought to vest the right to control the work of certain persons in its so-called "consignee." The evidence showed that defendant did in fact exercise control and the question of right of control was submitted to the jury which found for the plaintiff. In holding this was not error, the court reviewed the evidence and said:

> "Facts like those pointed out above as indicating a very complete control by the company of its products during the process of sale and delivery have been found determinative, and it has been decided that the oil company has not only held out the distributor as its employee, but has controlled and directed him in important particulars and in practical effect has retained power to subject him in the course of the business to its will and direction in any respect in which it might choose to do so. (citing cases) . . .
>
> "It is only by consideration of all of the facts pertaining to the relationship in any case, including the provisions of the contract, the actual conduct of the parties, and the conditions of the business in which they are engaged, that it can be determined whether the distributor is endowed with that control over his own methods and means of doing the work which is the

test of an independent contractor. No more definite test has been devised, and the Restatement of Agency itself, section 220 (2), merely lists certain matters of fact which, amongst others, may be considered in determining whether one acting for another is a servant or independent contractor. When these nonexclusive tests are applied to the facts of the pending case, we find confirmation of the conclusion we have reached."

In *Willard Sugar Co. v. Gentsch, supra,* where one of the questions was whether one Kolb was an employee of the plaintiff for social security and employment tax purposes under a contract specifically reciting that Kolb should not be subject to the control or supervision of the plaintiff, the court said:

"These recitals or written provisions in the contracts, however, are not convincing. It is entirely unimportant what designation or terminology was used in these written instruments to denote the relationship of the parties, when the evidence persuasively shows that the relationship was that of employer and employee and not of contractor and contractee."

In *Wabash R. R. Co. v. Finnegan, supra,* the question was whether certain persons were the employees of the plaintiff railroad under the Carrier Taxing Act. Plaintiff claimed such persons were the employees of a company which had contracted in writing to perform certain services for it. Three of the contracts expressly required the contractor to supervise and exert authority over the workmen in the performance of their services. In rejecting this claim and holding that the plaintiff was the employer notwithstanding the written contracts, the court said:

"All of the control, supervision and authority exercised over the workmen was by plaintiff. It directed the workmen, to no less an extent than had it employed them and carried them on its payroll. The nature of services to be performed was such that the plaintiff could not surrender control and supervision in fact,

> even if it did so in words. Plaintiff and the contractor, by their conduct, gave a necessary practical construction as to the instruments signed by them. This construction is entitled to great weight in determining the proper interpretation to be placed upon the contract. * * *"

The rule announced in the foregoing cases and applied by the district court in the cases at bar is summarized in 27 American Jurisprudence 488, as follows:

> "Whether the employer exercises control may be a fact to be considered in the determination of the relation of the parties * * * and the fact that during the performance of work, the employer has exercised no control may be considered as tending to show that he has no right to control."

The law is, therefore, clear that the District Court, notwithstanding the provision of the Form B contract purporting to vest the right of control in the ballroom owners, was entitled to consider the fact that the leaders, and not petitioners, exercised control of the manner and means of performance of the sidemen of their respective orchestras during the engagements as material evidence on which to base its finding that the leaders, and *not* petitioners, had the right of control over the means and manner of the performance of the sidemen in their orchestras during the engagements in question.

2. *The leaders, and not petitioners, had the exclusive right to hire and discharge the members of their orchestras.*

Another District Court finding which the majority opinion "brushes aside" is its finding that at all times and during the times of the performances by the several orchestras, the leader exercised and had the exclusive right to hire and fire the members thereof. (R. 662) The majority opinion

makes no mention whatever of this finding or the evidence supporting the same. That evidence shows that the personnel of each orchestra was selected and hired by the leader long before it ever appeared for the engagements for the ballroom operators. (R. 131, 132, 164, 270, 346, 347) The ballroom owners never had anything to do with selecting the sidemen of any orchestra, never had any conversation with either the leader or any sideman in that regard and knew nothing about the hiring arrangement between him and his leader. (R. 66, 73, 326, 327)

Each leader testified that he was the one who discharged the members of his orchestra, and that whenever a sideman quit his orchestra, such sideman came to him and notified him of his intentions in that respect. (R. 133, 164, 271, 349) Petitioners testified that they never discharged any sideman and never talked with any leader or sideman about discharging the latter (R. 66, 67, 326, 327), and that they did not believe they had such right to discharge. (R. 66, 67)

Illustrative of the evidence showing the leaders' understanding that they had the right to hire and discharge the sidemen of the orchestra is the statement of "Doc" Lawson in his letter of December 9, 1941, to Mr. Geer, as follows:

> "I *fired* my whole band and am starting out Dec. 20th *with all new men*, but two, and an entirely different style. As long as I am going commercial, I might as well go the whole way. *Have all my new men hired* and rehearsing six days to start out on." (Italics supplied) (Pltfs' Ex. B-29, R. 273, 272)

Having ignored the foregoing mass of evidence supporting the trial court's finding, the majority opinion does cite, as "generally illustrative" of the fact that the right of control in the ballroom owners was a "practical reality" after the Form B contract, an instance where "in one of the engagements in suit the orchestra appeared without its regular piano player and the ballroom operator exercised the

prerogative of selecting and requiring the leader to use a certain local musician for the performance." (R. 693) This is the *only instance* in the entire record in which interveners claimed any ballroom operator ever hired a sideman, and even in this instance the majority's version of what happened is directly contrary to the record testimony of Mr. Geer that he did not hire the musician in question but that the leader did (R. 321) and the record testimony of the leader wherein he refused to state that Mr. Geer hired her (R. 628) and admitted that he fixed the amount of her pay and paid her. (R. 629)

If the majority opinion by its "silent treatment" of the foregoing record meant to imply that the trial court's finding based thereon was wholly immaterial as having any bearing on the right of control, such implication is squarely refuted by the holdings of other courts in orchestra cases. For example, the record as to the right to hire and fire sidemen was the same in the case of *Williams v. United States*, 126 F. 2d 129 (C. C. A. 7th) as in the present cases, and the opinion of the court of appeals specified such right as one of the elements which must be considered to properly determine the question of who is the employer, saying:

> "A number of elements have been enumerated as bearing upon the right to control, such as the right to hire and discharge persons doing the work, (*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *Densby v. Bartlett*, 318 Ill. 616, 149 N. E. 591, 42 A. L. R. 1406) * * *."

Commenting further on the matter of the right to hire and discharge, the court said:

> "Without this right there could be no effective control by an employer. As was said in *Pioneer Construction Co. v. Hansen*, 176 Ill. 100, 108: " * * and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist, unless the power to discharge exists * * ". Other

cases to the same effect are *Casement v. Brown, supra, Shannon v. Nightingale,* 321 Ill. 168, 174."

After concluding that the evidence required a finding by the trial court that the establishment owners had no right to hire or discharge the members of the orchestra, the court stated the legal effect of such finding as follows:

> "To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer."

Another orchestra case dealing with the relation of the right to hire and fire to the right of control is *Los Angeles Athletic Club v. United States,* 54 F. Supp. 702 (S. D. Cal.), appeal dismissed 144 F. 2d 352 (C. C. A. 9th) wherein the court said:

> "Moreover, inasmuch as the right to control and direct the method and manner of doing the work necessarily involves the power to discharge, the existence or absence of this right on the part of the employer is a factor which strongly indicates the relationship involved in different situations."

In considering the record which proves that the leaders, and not the ballroom establishments, had and exercised the right to hire and fire the members of the orchestra it is important to note that numerous by-laws of the American Federation of Musicians contained in the official printed editions of 1941 and 1942 not only recognize that the right of hiring and firing of the sidemen is in the leader but expressly prohibit the granting of such rights to the establishment owners. The importance of these by-laws becomes immediately apparent upon examination of the provisions of the Form B contract stating that the by-laws of the A. F. of M. are made a part of the contract and providing in effect that such by-laws shall supersede and override any contrary provision of the Form B contract. (R. 13)

The Union by-laws affirming and recognizing that the right to hire and fire the sidemen is in the leader is Section 10-K of Article XIII as it appears in the 1940, 1941 and 1942 Official Edition of By-laws. It reads as follows:

> "All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two weeks' notice to the other." (Pltfs' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544, 538)

The record shows that the leaders adhered to the requirements of this by-law and followed the practice of giving two weeks' notice when they discharged a member of the orchestra. (R. 164, 271, 272, 349)

At least three of the by-laws which were in effect during 1941 and 1942 denied to any establishment owner the right to hire and fire the sidemen of an orchestra. The first of such by-laws is Section 29 of Article X (Interveners' Exs. 6 and 7, R. 596, 592 and 541, 542, 538), the pertinent provisions of which were quoted in the holding of the court in *Williams v. United States, supra,* as follows:

> "'Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished. * * *'"

Concerning this by-law the court said:

> "Thus the sidemen were prohibited from accepting engagements with the establishments or their agents. It would seem to follow that no relation of employer and employee did or could exist between the establishments and the sidemen. By the preclusion of such relation, the right of the establishments to hire and discharge was likewise precluded."

The same effect was given this by-law by the court in the cases of *Los Angeles Athletic Club v. United States, supra,* and *Spillson v. Smith,* CCH Unemployment Ins. Service, Vol. 1, Par. 9111 (N. D. Ind.), affirmed 147 F. 2d 727.

Another by-law to which we refer is Section 39 of Article X, which states:

> "A member of the Federation cannot accept an engagement to join a traveling band or orchestra from a non-member, neither can he negotiate with a non-member for such engagement.
>
> "A member shall be deemed guilty under the provisions of this law if he negotiates for such an engagement as named in the law with a non-member, even though he subsequently signs a contract for the same engagement with a member of the Federation." (Interveners' Exs. 6 and 7, R. 596, 592, and 542, 538)

Still another by-law containing a similar provision is found in that part of Section 18 of Article XII reading as follows:

> "Traveling members other than leaders must sign contracts with contractors, members of the A.F. of M." (Interveners' Exs. 6 and 7, R. 598, 592 and R. 543, 538)

The above by-law is made to specifically apply to traveling dance orchestras by the last paragraph of Section 10 of Article XIII. (Interveners' Exs. 6 and 7, R. 597, 592, and R. 545, 538)

It does not appear that any of petitioners were members of the American Federation of Musicians and the record shows that none of the owners of the Crystal Ballrooms were members. (R. 68) All the leaders and sidemen were at all times members in good standing of the American Federation of Musicians. (R. 653)

Common sense tells anyone that the leaders had to retain the power to hire and fire the musicians of the orchestras else the discipline, coordination of effort and standard-

ization of performance necessary to produce a marketable musical entertainment product would be lacking. The leaders did retain the power and the Union's by-laws realistically required that they do so. The same common sense also compels the conclusion that, regardless of all else, control over the work of an employee rests with the person who can say when and whether or not he is to work and draw pay and whether or not and when he shall cease to work and draw pay. It is therefore no wonder that the courts have consistently treated the right to hire and fire as "nearly decisive" and "strongly indicative" of an employment relationship.

3. *The leaders and not petitioners, determined the amount of wages of the sidemen of their orchestras and its manner of payment.*

Another District Court finding which the majority opinion "brushes aside" is its finding that the leader in the instance of each orchestra "exercised and had the exclusive right to contract for and pay their wages." (R. 662) The materiality of this finding is readily apparent from the holding of the Seventh Circuit Court of Appeals in *Williams v. United States, supra,* expressly enumerating as one of the elements having a material bearing on the right of control "the method and determination of the amount of payment of the workmen." The Eighth Circuit Court of Appeals likewise took into account this same element for the same purpose in *Bertino v. Marion Steam Shovel Co.,* 64 Fed. 2d 409.

The majority opinion makes no mention whatever of the foregoing finding or the evidence supporting same. That evidence is significant because it reveals that the Form B contract's provision that "on behalf of the employer the leader will distribute the amount received from the employer to the employees, including himself, as indicated

on the opposite side of this contract, or in place thereof on a separate memorandum supplied to the employer at or before the commencement of employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself" was nothing more nor less than an unrealistic fiction which in practice was wholly disregarded. Every witness who testified on the subject (including the leaders themselves) testified that the leaders fixed and determined the wages of the sidemen and the method of payment. (Al Menke R. 136-139, 158; Paul Moorhead, R. 168; "Doc" Lawson R. 272, 278, Pltfs' Ex. B-30, R. 279, 278; Griff Williams R. 360, 361, 367, 390, 391, 394, 630, 631; Bartels R. 65, 66, 98; Geer R. 324, 326)

Only one of the contracts involved in the *Bartels* case contains a listing of the names of the sidemen and their rate of pay in the form provided on the reverse side for such listing. That single instance of compliance was the Buddy Fisher contract. (Pltfs' Ex. T, R. 89, 82) An attempt was made to have Griff Williams explain the absence of such information on the reverse side of his contract as an inadvertence by stating that on the back of the great majority of the other Form B contracts covering engagements by his orchestra at various establishments following the one at the Crystal Ballroom on September 1, 1941, (R. 398) and particularly those at the Palmer House in Chicago, the Copley-Plaza Hotel in Boston and the Baker Hotel in Dallas, Texas, he always listed the names and wages of his sidemen. (R. 374, 376) This testimony was proved to be false and untrue. Photostatic copies of Williams' contracts for those engagements are in evidence. (Pltfs' Ex. B-40 to B-44, inclusive, R. 633-651, 632) and the reverse sides of all these contracts are *wholly blank.*

The record further discloses that Paul Moorhead was the only leader in the *Geer* case who listed the names and wages of the sidemen on the reverse side of his orchestra's

contracts, and even he did not comply with the Form B contract for the reason that he did not list the actual compensation paid his sidemen but only $5.00 and $6.00 per man, (Pltfs' Exs. B-6 to B-24, R. 177 to 251, 176) the union scale respectively for a three and four hour engagement. (R. 325) He testified that during the year 1942 he always paid his men higher than union scale. (R. 258)

Nor was the alternative mechanics of furnishing a separate memorandum listing of musicians and their pay complied with. The only leader who purported to furnish a separate memorandum listing the names and wages of the sidemen was Tiny Hill (R. 97, Pltfs' Ex. A-1, R. 99, 100, 98), and even in that lone instance the memorandum was not in accordance with the terms of the contract since it was not delivered at or before the commencement of the engagement but was given petitioners after November 15, 1941, (R. 98), more than six weeks following the date of the engagement. The requirement of the Form B contract that receipts of the sidemen for their compensation taken from the sidemen by the leader and turned over to the establishment owner was never complied with. (R. 65, 73, 325)

Because the record so shows, petitioners submit that, the Form B contract provisions to the contrary notwithstanding, the leaders fixed and determined the wages of the sidemen and the method of payment. The finding of the trial court on this question was a correct and unavoidable one, not only because of the evidence to that effect was undisputed but also because the evidence also shows that, consistently, the *mechanics* so ingeniously devised in the Form B contract were likewise treated by the parties as mere sham and subterfuge.

4. The leaders were each engaged in an independent business for profit.

Another District Court finding which the majority opinion "brushes aside" is its finding that the leaders managed and controlled the orchestras as independent contractors for hire, and that they kept all the profits and sustained all losses incurred in the playing of the engagements. (R. 662, 663) The District Court in its opinion (R. 658) said:

> "The leader created and established and *had for sale* an independent business and the ballroom operator was interested only in the result of the performance." (Italics supplied)

The trial court's finding that the leaders were entrepreneurs engaged in the business of selling and delivering an orchestra and its musical entertainment *product* amounts to a holding that the musicians of the orchestra could not be employees of the ballroom establishments who merely *bought* the *product*. This unchallenged lower court finding is therefore a transcendent consideration which, in and of itself, required the court to hold that the leaders and the members of their orchestras were not employees of the ballroom establishments. *Barnes v. Thomas A. Myers & Co.*, 163 Md. 206, 161 A. 279; *Petzold v. McGregor*, 92 Ind. App. 528, 176 N. E. 640; 27 Amer. Jur., p. 483.

In addition to its persuasive *independent* force, the fact that the leaders were, as the district court said, in the business of selling a musical entertainment product for profit is also of prime importance in determining whether the ballroom owners or the leaders had the right of control over the means and manner of performance of the sidemen's services. This was made crystal clear by the Seventh Circuit Court of Appeals in *Williams v. United States, supra*, when it listed as a third element bearing on the right of control the fact of "whether or not the person doing the

work is engaged in an independent business or enterprise, and, particularly, whether he stands to make a profit on the work of those working under him."

The majority opinion makes no mention of the district court's finding that each leader was engaged in an independent business for profit but instead holds in substance that such leader was nothing more than a foreman of a group of musicians to conduct them in the performance of their services. This has been the position of the interveners and the American Federation of Musicians throughout the various stages of this litigation.

The correctness of the trial court's finding and the error of the Circuit Court's holding will be readily apparent from a review of the record in these cases. Three factors provide the test of whether or not one contracting to render services is an entrepreneur engaged in a business of his own. They are (1) Whether the contractor's work requires the exercise of independent judgment and professional skill (*Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384); (2) Whether he works for one person or holds himself out as available to others (*Lichtenager v. Silverman*, 254 N.Y.S. 392); and most important of all, (3) Whether he stands to make a profit from the work of the men under him (*Williams v. United States, supra*). Every single one of the factors is present in the case of the leader of a dance orchestra like those in the cases at bar.

It is common knowledge that the leader of an orchestra requires a high degree of skill. The selection of musicians and instruments, the selection of arrangements and the compilation of a musical library, the directing of the musicians in such a way as to produce a certain distinctive style of music, and the choice of dance numbers all called for the exercise of judgment. This is consistent only with the conclusion that each leader was an independent contractor.

As pointed out by this court in *Metcalf & Eddy v. Mitchell, supra:*

> "* * * the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring out the desired result. This permitted to them liberty of action which excludes the idea of that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor."

It is equally clear that the leader of each of the orchestras held himself out as ready to perform engagements for various types of establishments. Each orchestra had been in existence for many years prior to its engagements for the petitioners and had played for hotels, cafes, ballrooms, amusement parks, state fairs, policemen's balls, American Legion Posts, university and college organizations and various civic organizations in a territory covering several states and in some instances the entire nation. (R. 71, 127, 163, 259, 265, 330, 331, 442) One leader even testified that his orchestra had been in existence since 1914 (R. 126) and was known and advertised as "The Band of a Million Friends." (R. 134) The orchestras also made records, performed at theatres and in some instances broadcasted over the radio on nation-wide hook-ups. (R. 71, 332) Griff Williams' press manual (Pltfs' Ex. C, R. 406, 398) gives the following glowing account of his orchestra's engagements:

> "This band, which recently smashed all records at the world's largest hotel, the Stevens in Chicago, has been a favorite of 'straight' music fans at choice hotels, night clubs, theatres throughout the country, * * *.
>
> "They record for Varsity Records and are heard on the air over NBC, CBS, and MBS networks and on the Fitch Bandwagon program."

Small wonder the Circuit Court of Appeals in the *Williams* case, *supra*, aptly described the orchestra as follows:

> "In other words, it was a going concern; ready and willing to serve any and all who might contract its services."

Finally, the record shows conclusively that each leader was conducting a financial enterprise from which he hoped to, and did, make a profit and from which he stood a chance of taking a loss. The leaders, without exception, testified that if anything remained from the proceeds of an engagement after the payment of the booking agent, the sidemen, transportation and other expenses, the leader received it. (R. 137, 138, 168, 277, 361, 362) They also testified that in the event the proceeds from an engagement were insufficient to pay the sidemen and the other expenses of the orchestra, the leader personally stood the loss. (R. 138, 277, 362)

The leaders kept detailed records of their business operations for the purpose of determining whether they made a profit or a loss, the same as any other business men engaged in independent business. Illustrative are the weekly business reports made by Paul Moorhead concerning his operations during 1941 and 1942. (R. 167-169) The report covering the week in which his orchestra's engagement of January 18, 1942, at the Crystal Ballroom was played (Pltfs' Ex. B-1, R. 167-169, 170) is typical of these reports. On one side of this report is listed the engagements for that particular week and the amounts received therefrom which are totalled and entered as "Total gross receipts $676.44." Beneath this entry is the recital, "Less—operating expenses this week—$574.91." Shown below this is the further recital "Balance—Profit—Loss $101.53." On the reverse side of the report which is entitled "Itemized Operating Expenses" appears a breakdown of expenses of

the orchestra for the week in question which include union tax in the sum of $26.80, salaries of the sidemen totalling $385.81, and various miscellaneous items as follows: gasoline, $30.80, oil $4.90, other transportation expense $20.92, Vic Shroeder Agency, booking fees $101.53, goodwill expense $5.75, special arrangements Bob Roper (music) $10.00, P.A. set repairs $4.45, telephone and telegraph $3.70, bus deodorant $0.25. On the same side appear other captions such as "interest paid", "insurance for business only", and "advertising", for which it appears that no expense was incurred during the week in question.

Similarly, Al Menke included the gross receipts from the engagements of his orchestra in his federal income tax return and took a deduction thereon as an expense item the weekly salaries paid his sidemen. (R. 138) As an employer he paid not only social security taxes to the federal government on these salaries, but also employment taxes to the state of Minnesota. (R. 137, 138) *His employment record was so favorable that, under the Minnesota law's merit rating system, he had the lowest contribution rate possible.* (R. 137)

A statement of Tiny Hill (Pltfs' Ex. A-1, R. 99, 100, 98) shows that after the payment of the expenses of his orchestra's engagement at the Crystal Ballroom (including compensation of sidemen), there remained an unexpended balance of $123.68 which he stated would be used for additional transportation, advertising, exploitation, additional booking expense, personal manager's salaries (cabs, lunches, etc.), of all kinds and any other legitimate expenses that may arise from time to time in the operation of what he frankly calls an "enterprise."

The record contains much additional similar evidence but a further review would only unduly prolong this brief. It is sufficient to say that one can hardly imagine a more typical independent business enterprise in every sense of

the word than the business of each leader in the cases at bar. Each orchestra had an established trade name which the leader owned and under which it was advertised and booked. Its personnel did not often change. The leader owned a distinctive theme song, which he used to identify his orchestra on the radio and in the playing of dance engagements. His orchestra had become identified with a distinctive style of music which it was known to produce and on which the leader relied to maintain the reputation and public acceptance of himself and his orchestra. The leader offered his musical product for sale at any time or place to those who would pay the price demanded by him.

The leader thus made sales of a product to cover his expenses of producing it (including the wages of his sidemen) and to afford him a profit. And if there was a loss from the operations of the enterprise he stood it. He was as much a business man as any other person engaged in an independent business for profit and in so holding, with respect to the status of Griff Williams on identical facts, the Seventh Circuit Court of Appeals in *Williams v. United States, supra,* said:

> "Another significant fact is that plaintiff was engaged in an independent business for profit. The court found that " ' ' the plaintiff paid the traveling expenses of the orchestra, commissions and other miscellaneous expenses, as well as the compensation of the sidemen, and the residue, if any, which in no event was less than the minimum scale for leaders, belonged to the plaintiff.' Thus, the plaintiff was in a position to receive a profit from the services of the orchestra. The compensation received by the sidemen was fixed by agreement with the plaintiff, but the amount received by him was to be determined by what was left after the payment of fixed charges. It is also pertinent to observe that the orchestra was not organized and trained at the behest of the establishments, but long prior to the year in question. In other words, it was

a going concern, ready and willing to serve any and all who might contract for its services."

Significant evidence of the universal recognition that orchestra leaders are entrepreneurs is supplied by the by-laws of the American Federation of Musicians. Standing Resolution 58[1] of the Union, expressly incorporated by reference as a part of the Form B contract after June 1942, reads as follows:

"To promote *his business*, a leader may borrow money in any manner not contraventive of Standing Resolution No. 58 or any other law, rule or resolution of the Federation, but he must not make any arrangement and/or agreement directly or indirectly subjecting him to interest and/or bonus of more than 10% per annum nor more than a total of 25% of the total sum borrowed and which is to be repaid. * * * *

"Leaders of bands or orchestras are prohibited from directly or indirectly, through any device or method whatever, acquiring any financial interest of whole or part *ownership* in any other band or orchestra, provided that a leader may wholly, but not in part, *own any other band which accepts or fills engagements under his own name.*" (Italics supplied) (Interveners' Ex. 6, R. 601, 602, 592)

Why such references to the leader "promoting his business", "borrowing money" and "owning bands" in the very union rules made a part of the Form B contract if, as interveners claim, the leader was merely a fellow employee?

That the leaders themselves, notwithstanding the pro-

[1] This resolution was first adopted at the June 1942 convention of the musicians' union (Pitts' Ex. 6, R. 592, 603), which was many months after the promulgation of the Form B contract and its incorporation in the union's 1941 by-laws. Note that the language of the resolution characterizing the leader as an employer directly contradicts the Circuit Court's holding (R. 696) in effect that such promulgation and incorporation of the Form B contract was intended by Petrillo and the union to repeal all By-Laws referring to the leader as the employer of the members of his orchestra.

vision [illegible] Form B contract, fully understood that each was engaged in an independent business of his own from which he stood to make a profit or sustain a loss, and that the sidemen in playing engagements were making what he had to sell—namely a distinctive style of music and entertainment—is well illustrated by statements made by "Doc" Law[illegible] in his letter of December 9, 1941 (Pltfs' Ex. B-29, R. 273, 272), as follows:

> "Am playing my last week with my present band and starting out December 20th with the old Dixieland band, a duplication of what I had *when I was making the money. The people here want two beat tempo and I have been forcing four beat on them or trying to, rather and not doing so well at it,* so am going back to a duplication of the band I had three years ago, suit cases of novelties, breaking fiddles, burning straw hats, etc. * * * I fired my whole band and am starting out Dec. 20th with all new men, but two, and an *entirely different style.* As long as I *am going commercial,* I might as well go the whole way." (Italics supplied)

In view of the foregoing uncontroverted record showing beyond question that an employment relationship existed between the leader and his sidemen, it is not surprising that the government has now conceded that such leader, and not the ballroom owners, was the person *"for whom the musicians worked steadily."* (Italics supplied) (See p. 7 of Collector's brief in opposition to petition for writs of certiorari).

Any attempt on the part of petitioners to exercise control over the means and manner of performance of the sidemen would destroy the orchestra and its value as entertainment.

As bearing on the question of right of control, the entrepreneurial nature of the leaders' business is significant because, in contending that control over the orchestras was

not, in fact, vested in the leaders, respondents are necessarily asserting that leaders who were undeniably in business for profit and constantly battling the ever-present concomitant danger of failure, nevertheless relinquished the *sine qua non* for their success (i.e. control over their musical entertainment product) to each ballroom establishment, as each one-night stand after another was played. The trial court in its opinion pointed out that if the "owner attempted to exercise any such right of taking charge and control of the orchestra it would destroy the orchestra and the result of a satisfactory entertainment. It just could not be done." (R. 662) Petitioners submit that the plain import of the trial court's statement, viewed in the light of its entire opinion and findings of fact, is that it is entirely unreasonable to believe that a leader intended to transfer to the ballroom owners the right of control over the performance of his sidemen when he knew that any attempted exercise of such right by such owners would destroy the orchestra and the value of its entertainment product.

The majority opinion does not question these consequences of the exercise of control by a ballroom owner, and the mere recital of a few obvious facts will readily demonstrate that they are not open to question. Permitting one after another ballroom owner to conduct the orchestra according to their varying and different whims would be bound to have a disastrous effect upon the leader's business. To permit each ballroom establishment to exercise the controls would necessarily ruin a profitable orchestra business in which the leader is engaged because it would render it impossible for the leader to furnish the quality and distinctive style of music essential for the successful conduct of that business. Each and every public appearance in which a substandard performance was given would do inestimable damage to the priceless reputa-

tion of the leader and his orchestra and to their public acceptance, which the leader had built up through many years of effort and the expenditure of large sums of money. All this being true, the trial court's inference as to disastrous consequences of an establishment's attempted control over the services of an orchestra was an entirely reasonable one which the court was entitled to consider as one of the reasons supporting its ultimate finding of fact that the parties did not intend to transfer from the leaders to the ballroom owner the right of control over the manner and means of the performance of the sidemen in their orchestras. The district court having performed its function as a trier of fact in selecting an inference which was entirely reasonable, it was not within the province of the Circuit Court to reweigh the evidence and substitute inferences respecting the same subject matter which it felt were more reasonable. *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

5. *The leaders of each orchestra, and not petitioners, furnished the tools (except the piano) with which the work was done.*

Still another element bearing on the right of control is "which party furnishes the tools or materials with which the work is done." *Williams v. United States, supra.* The undisputed record shows that the leader owned and furnished the music racks (R. 135, 166, 275, 319), musical arrangements (R. 58, 133, 166, 271, 356), and the loud speaking system used by the orchestra in the performance of its services (R. 135, 166, 275, 276, 356); that he selected the attire of the sidemen (R. 135, 166, 275, 314, 357); and that he or the sidemen furnished the instruments used by them in producing the orchestra's music. (R. 55, 314, 315) Only the piano was furnished by the ballrooms. (R. 55) In

the case of those orchestras which traveled by bus the leader owned such bus and paid for the insurance, gas, oil and tires and other expenses of its operations, including, in some instances, the salary of a driver. (R. 135, 166, 168, 169, 276, 313) The Circuit Court's view that these facts were immaterial in a case where a contract purports to vest the right of control in one of the parties (R. 698) is directly contrary to Section 220 of the American Restatement of the Law of Agency, which specifically lists the fact of whether the employer or the workman supplies the instrumentalities and tools as one of the matters, in addition to the agreement respecting control over the details of the work, which a court may consider in determining whether one acting for another is an employee or an independent contractor.

6. *The parties operated in the same manner after the adoption of the Form B contract as before.*

The district court found that "there was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestra, subsequent to June, 1941, or by reason of the Form B contract, than there was before that time." (R. 663) The majority opinion of the court below not only "brushes aside" this finding but substitutes its own contrary one in that part of its opinion where, having admitted that prior to such contract an orchestra leader was the employer of his sidemen (R. 687, 688) and hence possessed the right of control over them, proceeds to find that after the adoption of that contract such right was in the ballroom operators not merely as a legal but as "a practical reality as well." (R. 693) This statement is the equivalent of a finding that the parties had changed their conduct with respect to control of the sidemen and their services after the use of the Form B contract. Such a finding is directly con-

trary to the record evidence that the leaders, in the playing of engagements booked under such contract, at all times directed the performances of their sidemen, dictating such matters as the style of music, its length, tempo and volume (R. 55, 56, 73, 275, 315, 320, 321, 353-355), and the further record evidence that petitioners never gave any directions or instructions, either oral or written, to the leader and sidemen of any orchestra during the playing of its engagement (R. 108, 315, 319), and did not believe they had the right to give such directions. (R. 102, 103, 318) The finding is also contrary to one leader's testimony that both before and after the effective date of the Form B contract he did not permit an establishment owner to direct and instruct the sidemen of his orchestra. (R. 139) It is likewise contrary to the testimony of the leaders (R. 139, 253, 277, 327, 364, 365) and the ballroom owners (R. 67, 102, 327) that the manner in which the orchestras operated and the conduct and practice of the parties were the same after the Form B contract as they were before. It is not surprising in view of this evidence that the Collector in his brief (p. 6), in resistance to the petition for writs of certiorari made no attempt to defend the above mentioned finding of the Circuit Court of Appeals but made the sweeping concession as follows:

> "The subsequently established record in this case indicated that *the new contract did not in fact result in any change in the conduct of the business, or the exercise of actual control over the musicians exclusively by the leader*, and the trial court so found." (Italics supplied)

That the district court was entitled to find from the foregoing record evidence that the parties did not by the execution of the Form B contract intend to transfer the right of control over the means and manner of performance of the sidemen to the leader is clearly established

by the holdings of courts in the following cases: *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Neb.); *Spillson v. Smith*, (N. D. Ind.) C.C.H. Unemployment Insurance Service, Vol. I, Par. 9111, affirmed 147 F. 2d 727 (C.C.A. 7th); *McDermott v. Henrickson*, 45 F. Supp. 277 (S. D. Wash.); *Royal Theatre Corporation v. United States*, 66 F. Supp. 301 (Kan.); and *Electrolux Corp. v. Board of Review*, 129 N.J.L. 154, 28 A. 2d 207.

7. *Petitioners justifiably believed that the Form B contract did not change their status with respect to the orchestras.*

According to Section 220 of the American Restatement of the Law of Agency, another factor which is to be considered by a court in determining whether one acting for another is a servant or an independent contractor is "whether or not the parties believe they are creating the relationship of master and servant." In this connection Roy Bartels testified that at the time the contract for the engagement of Griff Williams and His Orchestra for October 13, 1941, first came into his hands from Music Corporation of America, Griff Williams' booking agent, which was prior to July 26, 1941 (R. 53), he noticed that it was a new form and called James Breyley, an official of that corporation, on long distance telephone and objected to signing the contract because of its references to the Crystal Ballroom as the employer. (R. 117) Bartels was then told by Mr. Breyley that the Form B contract was just a change that had been requested by Petrillo, and that it would not change his status a bit. (R. 116) Bartels further testified that at the time he read the provision of the Form B contract making all the rules, laws and regulations of the American Federation of Musicians a part of the contract (R. 119) and that he knew that certain of these by-laws referred to the leader as the employer of his side-

men (R. 120) and "that the acts and performances of these men would not be changed by this contract." (R. 118) Because of this knowledge and the assurance of Mr. Breyley, Bartels did not believe that the Form B contract changed his status with respect to the orchestras from what it had previously been (R. 121); nor did he ever understand that the terms of the contract were such that he assumed the obligations of an employer to the sidemen and the leader of the orchestra (R. 121); that in signing all of the contracts he denied he was the employer (R. 122); and he never believed before or after the Form B contract that he had the right to give directions or instructions to the leader and the sidemen of an orchestra in its performance of an engagement. (R. 102, 103)

The foregoing testimony is further substantial evidence directly supporting the district court's third finding (R. 663) that the parties at the time of the execution of the Form B contract did not thereby intend to transfer control or right of control over the sidemen and their method and manner of doing the work from the leader to the ballroom owners.

8. *No change was made in the Union by-laws made a part of the Form B contract, which by-laws clearly show that the parties intended that the orchestra leader, as an independent contractor, would be the employer of the sidemen.*

The Form B contract expressly recites that "all the rules, laws and regulations of the American Federation of Musicians * * * are made a part of this contract" and expressly provides that in case of conflict between any of the provisions of the contract and the obligations of members of the union as specified in the by-laws, the by-laws are controlling. (R. 12, 13) A comparison of the Union Secretary's official compilation of that organization's by-laws for

the year 1940 (Pltfs.' Ex. B-39, R. 607-614) with his official compilation of its by-laws for the years 1941 and 1942 (Interveners' Exs. 6 and 7, R. 592-599 and 538-545) discloses that no changes whatever were made in numerous by-laws obviously enacted to protect the sidemen of orchestras against various practices of their brother members who, as orchestra leaders, were their employers, with the result that the Form B contract contains provisions which directly contradict and nullify the effect of artful language elsewhere set forth in the contract seeking to make it appear that the establishment owner, and not the leader, was the employer of the sidemen.

These by-laws are as follows:

(1) *By-laws recognizing the leader's right to hire the sidemen of his orchestra.*

Sections 24 and 27 of Article IX (Pltfs.' Ex. B-39, R. 611, 607; Interveners' Exs. 6 and 7, R. 594, 592 and 540, 538)

Sections 24, 29, 39 and 45 of Article X. (Pltfs.' Ex. B-39, R. 611-612, 607; Interveners' Exs. 6 and 7, R. 595-597, 592 and 540-542, 538)

Section 18 of Article XII. (Pltfs.' Ex. B-39, R. 613, 607; Interveners' Exs. 6 and 7, R. 598, 592 and R. 543, 538)

Sub-sections I and L of Section 10 of Article XIII. (Pltfs.' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544-545, 538)

(2) *By-law recognizing leader's right to discharge sidemen of his orchestra.*

Section 10-K of Article III. (Pltfs.' Ex. B-39, R. 614, 607; Interveners' Exs. 6 and 7, R. 599, 592 and 544, 538)

(3) *By-laws recognizing leader's right to pay his sidemen and determine the amount of their compensation.*

Sections 23 and 48 of Article X. (Pltfs.' Ex. B-39, R. 610, 612, 607; Interveners' Exs. 6 and 7, R. 595, 597, 592 and 541, 543, 538)

(4) *By-laws recognizing leader as an independent contractor engaged in business for himself.*

Section 48 of Article X. (Pltfs.' Ex. B-39, R. 612, 613, 607; Interveners' Exs. 6 and 7, R. 597, 592 and 543, 538)

Section 10-C of Article XIII. (Pltfs.' Ex. B-39, R. 613, 607; Interveners' Exs. 6 and 7, R. 598, 592 and 544, 538)

The federal courts have held, in cases involving earlier forms of union contract which also incorporated by express reference the by-laws of the American Federation of Musicians, that Section 29 of Article X prohibits the existence of the relationship of employer and employee between an establishment owner and the sidemen of an orchestra notwithstanding other recitals in the contract purporting to create that relationship. *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th), *Los Angeles Athletic Club v. United States*, 54 F. Supp. 702 (S. D. Cal.) and *Spillson v. Smith*, (N. D. Ind.) C. C. H. Unemployment Service, Vol. 1, Par. 9111.

The district court, having concluded that each leader, and not the ballroom owners, was the employer of the members of his orchestra for the reasons stated in its opinion, did not find it necessary to pass on the question of whether the above mentioned by-laws were a part of the Form B contracts used to book the engagements involved in these actions. The Court of Appeals, however, because of its holding that the provisions of the Form B contract were conclusive of the relationship of the parties, necessarily was required to dispose of the question because of the contract's recital making such by-laws a part of the contract. It did so by holding that the statements of James C. Petrillo, President of the Musicians' Union, in his letter of May 1, 1941 (see page 24 of Pltfs.' Ex. B-37, R. 587, 582) to all locals that "this contract and none other must be used on all such engagements on and after June 1, 1941"

and "any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for such said violation" sufficiently required under the absolute powers vested in him by Section 1 of Article I of the by-laws, that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with the relationship attempted to be created by the provision for control in the Form B contract. (R. 696)

(a)

The letter of May 1, 1941, of James C. Petrillo, President of the American Federation of Musicians, did not constitute an implied repeal of the then existing by-laws in question.

The full text of Petrillo's letter of May 1, 1941 (see p. 24 of Pltfs' Ex. B-37, R. 587, 582) reads as follows:

"To all Locals of the
American Federation of Musicians:

Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with grand opera companies and symphony orchestras.

This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the Social Security Laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

This contract and none other must be used on all such engagements on and after JUNE 1, 1941. Any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for said viola-

tion. All engagements booked by licensed agencies must be contracted on these forms.

A supply of these contracts may be secured from the International Secretary's office.

Kindly be governed accordingly.

Fraternally yours,

JAMES C. PETRILLO,

President, A.F. of M."

Petitioners submit that the nullification effect given this letter by the majority opinion of the court below is clearly in error for two reasons. The first is that the only way Petrillo could change existing by-laws under the extraordinary power given him by Section 1 of Article I was by the issuance of an executive order which "by its terms" annulled or set aside the same. Petrillo's said letter of May 1, 1941, since it mentioned neither the by-laws nor anything about nullifying or setting them aside, was obviously not an exercise of this power. To nevertheless hold, as the court below did, that such letter had the effect of nullifying the by-laws by implication, is to grant Petrillo a power not contemplated by said Section 1 of Article I. In this connection it must be borne in mind that the meaning and effect of the absolute power which said section granted Petrillo to *nullify* any by-law was such as to require the entire musical entertainment world and the performers therein to be bound by a contract which amounts to an agreement that the rights, duties and liabilities of parties thereto shall be whatever Petrillo may by his arbitrary, capricious or wise decision, decide and determine them to be. It was because of the shocking extent of this extraordinary power that the union in its grant thereof expressly provided the safeguard that the same should be exercised in one and only one way, namely, by an order which "by its terms" *annuls* or sets aside a by-law. Not having been so exercised in the cases at bar, the power remained unexercised and the by-laws remained unchanged.

The second reason the majority opinion's said holding is in error is that at the time said letter was promulgated by Petrillo, neither he nor the American Federation of Musicians intended it to have the effect of nullifying any by-laws. The letter itself shows this to be true, not only because of the utter absence of any mention of the by-laws or any change therein, but also because its statement that "this contract and none other must be used on all such engagements on and after June 1, 1941", viewed in the light of the fact that the contract expressly incorporates by reference all by-laws as a part thereof, is as equally applicable to the contract's by-law provisions as it is to the contract's right of control provision. Being thus equivocal in nature, it furnishes no basis whatever for an inference that he intended the latter provision to supersede those containing the union by-laws. Moreover, the most the union's own witness ever claimed that Petrillo intended to accomplish was a revision and not a nullification of the by-laws. (R. 573)

Other circumstances which clearly show that neither Petrillo nor the union intended the former's letter of May 1, 1941 to have the effect ascribed to it by the majority opinion are the fact that the official copies of the federation's by-laws edited and published by its Secretary later in the year 1941 (Pltfs.' Ex. 7, R. 540-545, 538) and again in 1942 (Pltfs.' Ex. 6, R. 594-599, 592) contain the same verbatim by-laws as were claimed to have been nullified by such letter, and the fact that when the Secretary in July, 1944 did finally certify to a revision of Section 29 of Article X (one of the by-laws claimed to have been nullified by Petrillo) he officially stated that such revision was *not intended to take effect until September 1, 1944!* (R. 605, 606; pp. 12 and 14 of Pltfs.' Ex. B-38, R. 615, 617, 614) Surely the nullification by Petrillo by the exercise of his emergency powers of a score or more of by-laws which had

been on the books for more than fifteen years would have been an event of such noteworthy importance that the Secretary, whose duty it was to publish in the union's official journal not later than July following adoption all by-law changes (Interveners' Ex. 7, R. 539, 538), would have caused the same to be reflected in his official publication of the by-laws for the years 1941 and 1942. That he did not do so shows that the letter was not intended to have the effect which the majority opinion holds that it had. Moreover, it shows, as do all the other record facts above mentioned, that the claimed by-law annulment is such an incredible and fantastic story as to not be entitled to any weight whatever, and the Circuit Court therefore erred in basing its finding thereon.

Although the majority opinion of the court below held that the by-laws should not be treated or considered as a part of the contract by reason of Petrillo's proper exercise of "absolute" powers vested in him, it is noteworthy that the Circuit Court opinion claims that the effect of Petrillo's order was not *nullification* as provided for in Section 1 of Article I of the by-laws, but to "require . . . that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with . . . the 'Form B' contract." It is difficult to see how this statement of the Circuit Court's opinion can be squared with the provision of the Form B contract itself reciting that "the musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians." Every one of the by-laws in question created an obligation of the orchestra members to the federation. For example, Section 29 of Article X bound them to accept employment from the leader and not the ballroom owners. The court be-

low, in holding that the contract's provision regarding right of control made the sidemen the employees of the ballroom owners, was obviously guilty of a construction of the contract which directly interfered with the foregoing obligation. The same thing is true with respect to all the other by-laws in question. Petitioners submit that the above mentioned clause required the court below to consider the by-laws as paramount to any conflicting provision in the contract. That is exactly the effect which district court in *Spillson v. Smith*, supra, gave to the very same clause in the form of union orchestra contract which immediately preceded the Form B contract.

(b)

Assuming Petrillo's letter of May 1, 1941, did constitute an implied repeal of the then existing by-laws in question, such repeal did not nullify by-laws of like content which were re-enacted at the annual convention of the American Federation of Musicians in June 1941 and again at its annual convention in June 1942, and were therefore in full force and effect at the time each of the Form B contracts involved in these actions was executed.

The by-laws of the American Federation of Musicians making an orchestra leader the employer of the sidemen and prohibiting the existence of an employment relationship between them and an establishment owner were all re-enacted at that organization's forty-sixth annual convention held at Seattle, Washington, June 9-14, 1941 (R. 535, 536, Plfs.' Ex. 7, R. 538, 540-544), which was nearly a month and a half after May 1, 1941, the date on which Petrillo's letter prescribing the use of the Form B contract was sent to all union locals. The earliest Form B contract used to book an engagement in the case at bar is

dated June 25, 1941 (Pltfs.' Ex. W, R. 95, 82), which means that all of the Form B contracts involved herein were executed after the dates of the union's Seattle convention and hence all the by-laws adopted at that meeting necessarily became a part of those contracts. The same by-laws were again re-enacted by the union the following year at its annual convention held at Dallas, Texas, June 8-13 (Pltfs.' Ex. 6, R. 592, 594-599). Several of the Form B contracts in the cases at bar were executed in the year 1942 after these dates. (Pltfs.' Ex. A, R. 141, 140, and Plfts.' Exs. B-17 to B-23 incl., R. 221-245, 176)

It clearly appears from the foregoing record that even if it be assumed that Petrillo's letter of May 1, 1941 constituted an implied repeal of the by-laws in question existing on that date, such letter did not nullify by-laws of like content in force on the dates the Form B contracts involved herein were executed for the reason that all of such by-laws were re-enacted by the union at a time subsequent to the date of such letter and hence could not possibly have been affected by the alleged action of Petrillo taken prior to such time.

9. *The Form B contracts were not writings evidencing a meeting of minds of the parties arrived at through fair negotiations.*

Since the court did not conclude as a matter of law that the Form B contract was void for duress, it is apparent that the first part of his Finding No. 2 which reads as follows:

> "The contract, Form B, was not entered into by fair negotiation between the parties, but upon demand of the musicians' union and the leaders of the orchestras that it must be entered into or no orchestra could be obtained, * * *." (R. 663)

was merely in the nature of an auxiliary finding not essential to but further explaining and supporting his Finding No. 3 (R. 663) that the parties did not intend by their execution of the Form B contract to transfer from the leader to the establishment owner the right to control the means and manner of performance of the sidemen.

The above quoted finding is clearly supported by the undisputed evidence that neither the ballroom owner nor the leader negotiated the contract as free bargaining agents in the sense that they discussed the terms of their agreement and then incorporated those terms in a written contract prepared by either one or both of the parties. They used the Form B contract because James C. Petrillo, arbitrarily and dictatorially, ordered them to do so. For the leaders' failure to pay lip service to the contract meant being in violation of the Federation's laws (See letter of James C. Petrillo on p. 24 of Pltfs' Ex. B-37, R. 587, 582) and possible expulsion, and to the establishments it meant not getting orchestras. (R. 478, 488) Certainly these circumstances, while admittedly not sufficient to legally vitiate the contract on the grounds of duress, do indicate that the motivating force in signing the Form B contract was not a desire of the parties to actually transfer the right of control from the leader to the establishment owner but instead a desire to appear to comply with the autocratic command of Petrillo.

10. *Petitioners had not the necessary musical knowledge and skill to direct and control the means and manner of the performance of the sidemen.*

It does not appear that any of the petitioners possessed the requisite musical knowledge and skill necessary to direct any of the orchestras in the playing of its particular music. Roy Bartels was not a musician and could not prepare a musical arrangement. (R. 58) The lack of such

knowledge and skill is further evidence that the petitioners did not have the right to control the means and manner of the performance of the sidemen. In *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Nebr.), Judge Donohoe observed that "the hotel management were without training or natural talents, and were unskilled in the musical profession." Other respected courts are in accord. *United States v. Aberdeen Aerie No. 24*, 148 F. 2d 655 (C.C.A. 9th); *In re Barnaba Photographs*, 263 App. Div. 915, 32 N.Y.S. 2d 347.

C.

The accumulative effect of the evidence is overwhelming proof that the leaders had and exercised the right of control over the orchestra members.

The findings of fact of the district court on the question of right of control should have been sustained by the Circuit Court of Appeals because any one or two or three of the matters of fact reviewed in the foregoing subdivisions 1 to 10 amply support such findings. Certainly a mere fraction of the proof arrayed at the trial fully satisfies the requirement of "substantial evidence" to sustain the district court findings. Above and beyond that minimum requirement, this record comprises a consistent and full showing of the leaders as possessing and exercising every conceivable vestige and indicia of an employer and the establishment owners as possessing and exercising none. In reaching this same conclusion, Circuit Judge Gardner, in his dissenting opinion (R. 707, 708) said:

> "The evidence is clear and convincing that the leaders exercised complete control of the means and manner of performance. They and they alone had the right to hire and fire; they and they alone determined the wages of the sidemen; and they and they alone

actually paid the sidemen. The leaders were conducting an enterprise for profit, building up a name and reputation for themselves and their orchestras. The findings of the trial court that the leaders were in fact the employers is sustained not only by substantial evidence but by convincing proof. In fact, a finding that the contract correctly reflected the relationship of the parties would, I think, find no support in the evidence. No case could more convincingly illustrate an agreement which purported to create a certain relationship while the actual conduct and operation of the parties established another."

Petitioners submit that the accumulative effect of the record reviewed in the foregoing pages is overwhelming proof of the correctness of Judge Gardner's conclusion and hence the court below was clearly in error in holding that the evidence was insufficient to support the findings of the trial court.

As previously mentioned the unrealistic position of the Commissioner in cases involving the Form B contract and similar earlier forms has caused an avalanche of litigation and a wealth of court decisions on the identical question presented here. This court being committed to the doctrine that "substantial evidence" sufficient to sustain the findings of the trier of fact is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (p. 47, supra), it is exceedingly significant that, throughout the length and breadth of the country, the minds of courts and juries have uniformly and consistently come to the same conclusion as that reached by the district court and Judge Gardner. In many of these cases the evidence was relatively fragmentary and established comparatively few of the ten separate kinds of proof of existence of employment relation between the leaders and their sidemen which are presented in this case. The Commissioner was a party in many of these cases and arguments similar to the respondents in this case addressed to

the courts in the many like cases have achieved a composite batting average of exactly zero. The federal court cases to which we refer are as follows:

Spillson v. Smith, 147 F. 2d 727 (C.C.A. 7th).

Williams v. United States, 126 F. 2d 129, certiorari denied, 317 U. S. 655, 63 S. Ct. 52, 87 L. Ed. 527.

Nebraska National Hotel Company v. O'Malley, 63 F. Supp. 26 (Neb.).

Biltgen v. Reynolds, 58 F. Supp. 909 (Minn.).

Los Angeles Athletic Club v. United States, 54 F. Supp. 702 (S. D. Cal.), appeal dismissed 144 F. 2d 352 (C.C.A. 9th).

Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. United States, 50 F. Supp. 734 (Wash.) appeal dismissed 142 F. 2d 462 (C.C.A. 9th).

Longo, d/b/a Biffy Night Club v. Glenn, (W. D. Ky.) (Not officially reported).

In Re Ten Eyck Co., Inc., 41 F. Supp. 375 (N. D. New York).

The state court cases are as follows:

Seattle Aerie No. 1, etc. v. Commissioner of Unemployment Compensation, 23 Wash. 2d 167, 160 P. 2d 614.

Palmer et al. v. Michigan Unemployment Compensation Commission, 310 Mich. 702, 18 N. W. 2d 83.

Hill Hotel Co. v. Kinney, 138 Neb. 760, 295 N. W. 397.

Unemployment Compensation Commission v. Matheus, 56 Wyo. 479, 111 P. (2d) 111.

In re Earle, 262 App. Div. 789, 27 N.Y.S. (2d) 310, aff'd by New York Court of Appeals, 36 N. E. (2d) 453.

In Re Brown, 260 App. Div. 972, 23 N.Y.S. (2d) 330.

Claim of Miller, 29 N.Y.S. (2d) 15 (S. Ct. App. Div.).

People v. Grier, 53 Cal. App. 2d 841, 128 Pac. (2d) 207.

Commonwealth v. Adelphia Hotel Co., Pa. Com. Pleas Court, Feb. 24, 1942.

In Re Muni, 44 N.Y.S. 2d 924 (New York App. Div.).

In Re Jermyn Hotel Company (Pa. Common Pleas, Sept. 3, 1946) C.C.H. Unemployment Service, Pa. par. 8149.

Each of the above cited cases deals with the exact question which constitutes the crucial issue of this case. It is submitted that those cases conclusively establish the law to be that, under the facts here involved, the establishment owner is not the employer of the orchestra leader and his sidemen and the decision of the Circuit Court of Appeals in the present cases is in error and should be reversed by this court.

III.

The Circuit Court of Appeals substituted its findings of fact for those of the district court on the question of whether the parties actually intended that the right of control over the services of the orchestra members should be in the ballroom owners and not the leader.

The majority opinion admits the parol evidence rule left petitioners "free to prove by parol, if the facts so were, that instead of the agreement having been that the legal right of control of the leader's and the orchestra members' services should be given to the ballroom operators, the agreement actually was that it would remain in the leader, or that the parties had never in fact undertaken to agree as to who should have the legal right to control." (R. 690) The opinion then proceeds to weigh the evidence and makes clear cut findings of fact in language as follows:

"The evidence, however, in our opinion, fails to establish either of these situations in relation to the negotiation and execution of the contract. To the contrary it shows that, when the 'Form B' contract initially was presented to the ballroom operators in engaging the services of an orchestra, they had objected to the provision giving them the legal right of control and making them employers, until they were told that this was the only basis on which they could obtain the services of the orchestra, and that they thereupon executed the contract and each of the other contracts thereafter and accepted the services of the various orchestras under them. On these facts we think it must be held that the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members and so had created the common-law relation of employer and employee between them, at the time the contracts were executed at least." (R. 691)

Petitioners submit that foregoing finding of fact that "the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members" is directly contrary to the third finding of fact of the district court as follows:

"3. At the time of the execution of the contracts, Form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestra or any of the sidemen, or the method or manner of doing its or their work in any particular." (R. 663)

There was not only substantial but abundant evidence to sustain this finding in the undisputed testimony of one of the petitioners that when he objected to the references to him as an employer in one of the first Form B contracts presented to him, he was told by the booking agency which represented the leader in negotiating the transaction and which booked a number of later orchestra engagements at the Crystal Ballroom that the Form B contract was just a change that had been requested by Petrillo and that it would not change his status a bit. (R. 116) The finding is further supported by this same petitioner's testimony that he knew that certain by-laws of the musicians' union incorporated in the Form B contract by express reference referred to the leader as the employer of the sidemen (R. 120); that he didn't believe the Form B contract changed his status with the orchestra from what it had been before (R. 121); that he never understood that the terms of the contract were such that he assumed the obligations of an employer to the sidemen and the leader of the orchestra (R. 121); that in signing all the contracts he denied he was the employer (R. 122); and he never believed before or after the Form B contract that he had the right to give directions or instructions to the leader and sidemen of an orchestra in its performance of an engagement. (R. 102, 103)

Further evidence supporting the finding is the undisputed record fact that at the time the Form B contract was signed no new and different arrangement or contract was made between the leader and his booking agent, and that the then existing booking contract repeatedly referred to the employer and employee relationship between the leader and members of his orchestra. (R. 444, 445, Pltfs.' Ex. N, R. 461-467, 455, 556) Still further supporting evidence consisted of testimony of the leaders that the manner in which the orchestras operated and the conduct and

practice of the parties were the same after the Form B contract as they were before (R. 139, 253, 277, 327, 364, 365), and the testimony of one of the leaders that he did not permit an establishment owner to direct the sidemen of his orchestra at any time during the period when its engagements involved herein were played. (R. 139)

In addition to this direct evidence supporting the district court's above mentioned finding there was also clear and convincing circumstantial evidence reviewed earlier herein (pages 48 to 76) conclusively establishing that each leader at all times did the hiring and discharging of the sidemen in his orchestra, fixed and determined the amount and manner of payment of their wages, directed and controlled their performances in the playing of an engagement, furnished the tools with which the work was done, was engaged in an independent business for profit, and was recognized as the employer by the by-laws made a part of the Form B contract, from which evidence the district court could reasonably infer that the leader intended to exercise all the prerogatives of an employer including the right of control notwithstanding his execution of the B contract. Circuit Judge Gardner was of the opinion that this evidence was not only substantial but abundant to sustain the findings of the district court and that a finding that the contract correctly reflected the relationship of the parties would find no support in the evidence. (R. 708)

The majority opinion entirely disregards this abundant evidence sustaining the district court's finding No. 3 and instead singles out to sustain its own conflicting finding on the same question of ultimate fact one bit of evidence to the effect that when the Form B contract was first presented to the ballroom operators they had objected to the Form B contract until they were told that was the only basis on which they could obtain the orchestra and thereupon executed the contract. (R. 691) The majority opin-

ion wholly ignores one very significant fact which materially changes the whole import of this evidence, namely that in the same conversation with a leader's booking agent in which the ballroom owners were given this information, they were also told by such agent to go ahead and sign the contract, that it was just a change that had been requested by Petrillo, that it would not give the ballroom owners any more power than they had before and that it would not change their status a bit. (R. 116) In this same connection petitioners here point out that the only contracts which petitioners intended to sign were contracts containing by-laws which they knew made the leader the employer of his sidemen (R. 118, 120) and if these by-laws were not then a part of the contract which is what the majority opinion holds (R. 695, 696), then obviously there was no meeting of minds so as to create any contract for each of the engagements in question, and this fact standing alone is sufficient to sustain the district court's third finding.

In an endeavor to strengthen its finding that the parol evidence showed that the parties specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members, the court below found that the conduct of the parties after its execution of the Form B contract showed that the right of control "did have not merely a legal but a practical reality as well." (R. 693) This finding conflicts squarely with the district court's first finding "that at all times and during the times of the performances by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work" (R. 662) and its second finding that "there was no difference in the conduct and control of the orchestras, or the right to so conduct and control such or-

chestras, subsequent to June, 1941 than there was before that time." (R. 663) The substantial evidence sustaining these two findings is reviewed on pages 48 and 49 and pages 34 and 72 of this brief and for that reason will not be repeated here.

Petitioners submit that since the findings of the trial court on the matters in question were supported by substantial evidence, the Circuit Court was without authority to weigh the evidence and substitute its own findings for those of the district court, and its action in so doing was error under the well settled rule of this court.

McCaughn v. Real Estate Land, Title & T. Co., 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879.

United States v. Jefferson Elec. Mfg. Co., 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.

Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356.

IV.

The terms of the Form B contract were not sufficient to create the relationship of employer and employee between the ballroom owners and the leaders and the members of their orchestras.

The decision of the court below that the Form B contract establishes on its face the legal relationship of employer and employee is based entirely on the assumption that its recital dealing with the right of control over the orchestra's services had the legal effect of vesting in the ballroom owners the right to control the means and manner of the performance of the orchestra members. Petitioners submit that a proper analysis of the exact language of such recital in the light of other provisions in the contract shows this assumption to be wholly unwarranted. That language clearly states that the services over which

control is granted are "the services to be rendered under the specifications of this contract." The only specifications of the contract are: (1) the place where the services are to be rendered, (2) the date on which they are to be performed, and (3) the duration of the same. These three specifications *are all matters pertaining to results to be accomplished. There is not a single specification in the Form B contract regarding the details of the work to be performed by the individual orchestra members.*

The manner of performance of their work not being "a specification of the contract" the contract provision as to control actually negatives rather than establishes an employment relationship between the sidemen and the ballroom proprietors. However viewed, the provision referred to is too indefinite to permit the interpretation that it granted control over the details of the work to be performed by the musicians under the contract. It cannot, by any stretch of the imagination, be said to have granted to petitioners the right of directing how or in what manner the sidemen in the orchestra should actually perform their services. In taking exactly this view of a similar provision of a written contract involved in the case of *Humpton v. Unterkircher & Sons*, 97 Iowa 509, 66 N. W. 776, the Supreme Court of Iowa said:

> "It is true that each contract provides that the work was to be done under the direction of the defendants, and their architect, and to their entire satisfaction, approval, and acceptance; but it is manifest that this direction, approval, and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed, or who discharged. They had the right, under their contracts, to say what should be

done, but not how it should be brought about, or who should do it.

> "Appellant relies largely upon the use of the word 'direction' as employed in the contracts referred to. We do not regard this as in any sense conclusive. When we look at the whole contract, it is apparent that the only direction the architect or the owner could give, was, as to what should be done to accomplish the ends aimed at by the contract. He could not dictate the means or methods to be employed. This is the interpretation which has uniformly been placed upon such contracts."

In this connection, attention is again directed to the Federation's by-laws expressly made a part of the Form B contract. These by-laws nullify, contradict and completely abrogate the provision in the Form B contract insofar as it does purport to vest in the establishment owner the right to control the services of the orchestra members.

It should be further noted that the Form B contract does not even purport to divest the leader of some of the characteristic controls of an employer. By the terms of the Form B contract the leader clearly retains the right to select each sideman of the orchestra because the leader specifies who the musicians are to be and, even after the signing of the contract for the engagement, the leader can wait until the date of the engagement before giving the establishment a list of the sidemen whom he has selected. Furthermore, under the language of the Form B contract, even after the leader has supplied a list of the musicians, he still has the right to change and replace the personnel after the engagement begins. This was pointed out by Judge Donohoe in *Nebraska National Hotel Company v. O'Malley*, 63 F. Supp. 26 (Neb.). After referring to the provisions of the Form B contract respecting control, he said:

> "In addition to this provision, we observe a further provision in the contract which purports to repose in

> the leader of the band or orchestra, in effect, the right to hire and fire; that is, by giving him the right to select and discharge the performers; in other words, a transfer back to the leader of a part, at least, of the supervision or direction which the other terms of the contract attempt to impose in the hotel or its manager."

There are still other striking deficiencies in the Form B contract which would have to be considered if it were to be looked upon as determinative evidence. Other than the establishment, there are no other signatory parties except the leader or his booking agent. No provision is made for any sideman's signature on the contract. It is the leader who specifies on the contract the amount of pay to be received by each member of the orchestra and therefore has, on the face of it, the right to control that matter.

On the ground that the terms of the Form B contract made no change with respect to who selects the members of an orchestra and fixes and determines their compensation, the National War Labor Board in the *Matter of Hotel Ass'n of New York City, Inc. and American Federation of Musicians* (September 26, 1945) held that the members of "name" orchestras were not the employees of certain New York City Hotels for wage stabilization purposes. Included among such orchestras was the orchestra of Griff Williams, one of the interveners herein.

It, therefore, appears that even if this court were to disregard the many record facts showing the true relationship of the parties and instead confine itself to the terms of the Form B contract, the decision of the Circuit Court of Appeals should be reversed and the decision of the district court upheld for the reason that those terms were not sufficient to vest in the ballroom owners the right to control the manner and means of the performance of the orchestra members.

CONCLUSION.

It is submitted that a clear and realistic analysis of the undisputed facts showing the true relationships in each of the pending cases reveals that the ballroom owners were not the employers of the leaders and members of the orchestras and that instead the leaders were the employers of the members of their respective orchestras and responsible for the taxes imposed on employers by the Federal Insurance Contributions Act and Federal Unemployment Tax Act. What Congress has commanded to be taxed must be taxed. No contract framer's sleight of hand or other superficial device can becloud or hide the true picture of the actual relationships which prevailed in these cases. The decision of the Circuit Court of Appeals is based on untenable grounds and should be reversed by this court.

Respectfully submitted,

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APPENDIX A.

STATUTES AND REGULATIONS.

Section 1426 of the Internal Revenue Code, as amended by Section 606 of Social Security Act Amendments of 1939 (26 U. S. C., Sec. 1426): "DEFINITIONS.

* * * * * * * *

"(b) *Employment.* The term 'employment' means * * * any service, of whatever nature, performed * * * by an employee for the person employing him." * * *

* * * * * * * * *

The definition of employment in Section 1607 (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939, is identical.

Treasury Regulations 106, pertaining to the Federal Insurance Contributions Act:

"Sec. 402.204. *Who are employees.* Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

"Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another

merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

"Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

"Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act * * *"

Treasury Regulations 107, Section 403.204, pertaining to the Federal Unemployment Tax Act, are identical.

FILE COPY

APR 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 731.

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS,

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS, RESPONDENTS

No. 732.

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

STATEMENT AS TO CONFLICTING POSITIONS OF GOVERNMENT-RESPONDENT AND INTERVENER-RESPONDENTS.

The Intervener-Respondents' contentions are in violent conflict with the position taken by the Government-Respondent on the basic question of the correctness of the

holding below to the effect that the Form B contract, in and of itself, conclusively established an employer-employee relationship between the ballrooms and the sidemen and precluded consideration of other record facts proving a relationship different from that ostensibly created by the contract. In no uncertain terms the Government-Respondent's brief repudiates the "(lower) court's view of the conclusive nature of the contract" (p. 14) while practically all of Intervener-Respondents' brief is devoted to efforts to defend that holding.

Because of this situation this brief will deal first with the sole point of disagreement between petitioners and the government, namely, the question whether or not the Commissioner's determination on the disputed question of fact as to who was the employer is conclusively binding on the courts. The later pages will then reply to Intervener-Respondents' arguments which ask a holding of this court which the government brief candidly states would "permit circumvention of legislative enactments through mere skill in drafting legal papers which bear little or no relationship to the actual management of the affairs they purport to describe."

SUMMARY OF ARGUMENT.

I.

No finality or incontestability attached to the Commissioner's erroneous decision on the ultimate fact question of existence of employment relationship.

II.

Reply to Interveners' Brief.

A.

Correction of erroneous assumptions of interveners as to issue presented and as to certain facts.

1.

The basic question in these cases is not whether the leaders could become the employees of the petitioners but whether under all of the facts of this record the leaders were the employees of petitioners.

2.

The record facts abundantly sustain the trial court's finding that the parties to the Form B contract never intended that it would operate to transfer right of control from the leaders to petitioners.

B.

The rule that a written contract is not conclusive in determining the relationship of the parties is not confined to cases where the contract does not expressly vest the right of control in one of the parties.

C.

The decisions holding that a contract is not conclusive of a relationship are not based on a finding that the parties by their conduct either abrogated or abandoned the contract or substituted a new agreement.

D.

The so-called rulings of the Commissioner on fragmentary facts and on account of ex parte conferences with interveners' representatives did not purge the Form B contract of its character as "an anticipatory arrangement" to escape taxes.

E.

The rule that a taxpayer may lawfully change his status to avoid taxation has no application to the present cases wherein the undisputed record shows that the conduct of the parties, following the advent of the Form B contract, remained unchanged.

F.

The Form B contract itself expresses a primary intention that, in the event of a conflict between the by-laws of the American Federation of Musicians incorporated therein and its other provisions, the by-laws shall be controlling.

G.

Interveners' contention that the parol evidence rule applies to the present cases is not sustained by the authorities.

H.

Independent contractors are not employees within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

I.

The record evidence persuasively indicates that if the fictions of the Form B contract were to be considered determinative the task of administering the social security laws would be rendered more difficult rather than simplified.

ARGUMENT.

I.

No finality or incontestability attaches to the Commissioner's erroneous decision on the ultimate fact question of existence of employment relationship.

The Government-Respondent brief makes clear that it *insists* that the government *not* be bound by any rule which would preclude the Commissioner from considering and taking into account "other factors" where there is involved a formal contract "reciting that a particular person is the employer and giving him the right of control" (p. 10). As a sole ground of defense of the decision below, the government now, nevertheless, contends that where such formal contract exists the Commissioner has the right to choose to treat the contract as conclusively establishing the fact as to which contracting party is the employer and that, right or wrong, such determination is not subject to court review. To that contention this division of brief will be addressed.

The government brief in the court below contained a profound statement of the basic premise or starting point for analysis of the question at hand. That brief said:

> "The substantive provisions of our revenue laws are drawn so that a tax is imposed depending upon the existence or non-existence of *specified facts*. Here the crucial fact is the *employment relationship*, which in turn depends upon whether the right of control was reserved." * (Italics added)

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* Except for a sentence containing an argumentative assertion that administration of the Act would be "hampered" if the ascertainment of the coverage "must always abide judicial determinations on the basis of individual factual situations" and a brief reference to *Higgins v. Smith*, 308 U. S. 473, as holding that the government may acquiesce in a fiction if it serves the interests of the government to do so, the government's brief below was devoted entirely to argument that the District Court erred in its factual determination.

As the distinguished then Assistant Attorney General, Samuel O. Clark, Jr., so aptly said, liability of the petitioners for the social security taxes on the orchestra members' wages depends upon the existence or non-existence of the employment relationship, an ultimate *fact* the existence of which means liability and the non-existence of which means non-liability.

Although the government now virtually admits that the Commissioner erred in determining that an employment relationship existed between Petitioners and the orchestra members, the government nevertheless contends that the *Commissioner's* admittedly erroneous *determination* operates to conclusively establish the fact and to fix and fasten tax liability upon Petitioners.* The proposition thus advanced violates every fundamental principle of sound administrative law and is utterly incongruous and inconsistent with the plan and framework of the Revenue laws which grant stringent tax collection remedies to the Commissioner of Internal Revenue, and, in turn, assure to every taxpayer a day in court to contest the validity of each tax exaction. Analysis of the Revenue laws and of the consequences of adoption of the rule contended for by respondent will readily demonstrate that this is true.

This court has long recognized the Internal Revenue laws as providing a magnificent "system of corrective justice" providing two alternative routes for redress of any taxpayer's grievance on account of a wrongful tax exaction, each of the alternative routes being intended to operate independently and to afford complete relief. *State Railroad Tax Cases*, 92 U. S. 575, 613; *Dodge v. Osborn*, 240 U. S. 118.

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* Even though it be denied that the government's brief amounts to an admission of the Commissioner's fact finding error, it is obvious that the contention under discussion is properly analyzed and tested by assuming such concession.

The taxpayer's appellate remedy through the Board of Tax Appeals—now Tax Court—envisages a review of the Commissioner's decisions by a special tax tribunal vested with plenary and effective powers. *Old Colony Trust Company v. Commissioner*, 279 U. S. 716. It is a well established rule of that tribunal that the fact decisions and rulings of the Commissioner have no greater weight or effect than to give rise to a rebuttable presumption of correctness. *Big Wolf Corp. v. Commissioner*, 2 T. C. 751 (Acq. 1943 C. B. 3); *Clara O. Beers*, 34 B. T. A. 754. This court has consistently refused to disturb decisions of the Board of Tax Appeals—Tax Court reversing the Commissioner *upon the premise and assumption* that his factual determinations are only prima facie correct and not conclusively binding. *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Commissioner v. Scottish American Investment Company, Ltd.* 323 U. S. 119; *Wilmington Trust Company v. Helvering*, 316 U. S. 164.

Alternatively, there is made available to aggrieved taxpayers the procedure involving payment of the Commissioner's tax demands and then seeking redress for any wrongful exaction through court action for refund. The plan and theory behind this alternative remedy was succinctly described in *United States v. Jefferson Electric Manufacturing Company*, 291 U. S. 386, 395, 396 as follows:

> ". . . Anterior to collection the Commissioner possesses exclusive authority to revise, correct or reject assessments and the courts are forbidden to entertain suits 'to restrain the assessment or collection.' After collection aggrieved taxpayers are accorded a limited time within which to apply for refunds, and the Commissioner is authorized to grant the applications where the taxes are shown to have been erroneous or illegal; *but a denial by him is not final.* If the application is either denied or not acted on by the Commissioner the taxpayer is accorded a fixed period within which to bring suit for a refund against the United

States or the collector who received the tax, and if in the suit he establishes that the tax was erroneous or invalid, that it was paid by him, and that his claim has been duly and seasonably presented and prosecuted, he is entitled to judgment for a refund of the amount paid with interest." (Italics added)

Consistent with the guiding principle applicable in the Board of Tax Appeals—Tax Court tribunal, this court, in reviewing refund proceedings, has uniformly held that fact determinations of the Commissioner are properly treated and considered as only prima facie evidence of correctness and not as conclusive. *United States v. Rindskopf*, 105 U. S. 418; *Wickwire v. Reinecke*, 275 U. S. 101; *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551; *Lucas v. Ox Fibre Brush Co.*, 281 U. S. 115; *Welch v. Helvering*, 290 U. S. 111; *United States v. Jefferson Electric Manufacturing Co.*, 291 U. S. 386. Typical statements of the rule applied in the refund cases are

Wickwire v. Reinecke, Supra:

"It is quite clear that . . . the ruling of the trial court was erroneous, and that the decision of the Commissioner of Internal Revenue was not conclusive, but only furnished prima facie evidence of its correctness."

Williamsport Wire Rope Co. v. United States, Supra:

"It is true that where the Commissioner's action is reviewable judicially, his findings of fact in making an assessment, as distinguished from his determinations involving administrative discretion, constitute only prima facie evidence; and that, in cases arising under the internal revenue laws, such findings are commonly reviewable by courts in appropriate proceedings in which the facts become an issue. *United States v. Rindskopf*, 105 U. S. 418, 422, *Wickwire v. Reinecke*, 275 U. S. 101."

United States v. Rindskopf, Supra:

"The assessment of the Commissioner of Internal Revenue was only prima facie evidence of the amount due as taxes upon the spirits distilled between the

dates mentioned. It established a *prima facie* case of liability against the distiller and nothing more. If not impeached, it was sufficient to justify a recovery; but *every material fact* upon which his liability was asserted was open to contestation."

The circuit courts and the Court of Claims uniformly apply the rule of the above quoted cases. *United States v. State Street Trust Co.*, (CCA 1st) 124 F 2d 948, 950, 951; *Van Norman Co. v. Welch*, (CCA. 1st) 141 F 2d 99, 104; *Wilson v. Eisner*, (CCA 2nd) 282 F 38, 42; *United States Trust Co. of N. Y. v. Anderson*, (CCA 2nd) 65 F 2d 575, Cert. Den. 290 U. S. 683; *Pittsburgh Hotels Co. v. Commissioner*, (CCA 3rd) 43 F 2d 345, 347; *Lunsford v. Commissioner*, (CCA 6th) 62 F 2d 740, 742; *Jones v. Commissioner*, (CCA 7th) 38 F 2d 550; *Spillson v. Smith*, (CCA 7th) 147 F 2d 727; *E. Albrecht & Son v. Landy*, (CCA 8th) 114 F 2d 202, 206; *Anglim v. Acme Brewing Co.*, (CCA 9th) 143 F 2d 412, 415. Cert. Den. 323 U. S. 765; *Motter v. Patterson*, (CCA 10th) 68 F 2d 252, 253; *Betts v. United States*, 62 Ct. Cl. 1; *Meyer v. United States*, 60 Ct. Cl. 474.

In this very case the Commissioner is insisting upon preservation of *his* right to consider and take into account evidential factors other than the parties' contract in determining the existence or non-existence of an employment relationship. (Resp. Brief p. 15-17). The Treasury Department's own regulations and rulings in effect at the moment when his factual determinations in the cases at bar were made, as well as all other authorities, clearly establish the law to be that at least nine evidentiary factors all are pertinent to and shed light on the question of existence or non-existence of employment relationship.* The Commissioner is here claiming finality for a factual decision which was admittedly made without consideration

* Authorities referred to are set forth in petitioners' brief at pages 20 to 38.

of any of the pertinent evidence except that supplied by the Form B contract. The government's brief admits that the Commissioner's ruling and decision which unalterably fixed his position in the cases at bar were rendered long before the orchestra engagements here involved were arranged for or played and were based entirely and exclusively upon the provision of the Form B contract purporting to vest right of control in the ballroom establishments. (Resp. Brief, pp. 8, 9, 21) In this situation, to contend that the Commissioner may arbitrarily choose to consider and give weight to but one of the numerous pertinent evidential factors is the exact equivalent of asking this court to abandon and repudiate its uniform holdings limiting the effect of the Commissioner's decisions to prima facie evidence of correctness, and to undermine and remove the very cornerstone foundation of the "system of corrective justice" thus far prevailing in the Internal Revenue laws.

When a similar erroneous fact finding of the Commissioner was reviewed in *Lucas v. Ox Fibre Brush Co.*, 281 U. S. 115, the court, speaking through Chief Justice Hughes, said:

> "Being deductible as a reasonable payment there was no authority vested in the Commissioner to disregard the actual transaction and to readjust the income on another basis which did not respond to the facts."

The cases at bar present no unique or peculiar situation affecting the application of the general rule of nonfinality of the Commissioner's assessment and the factual determination upon which it was based. No claim has been made that the Commissioner's decision in question was made in exercise of any specific or special grant of administrative discretion. No provision of the Internal Revenue Laws or of the Social Security Act investing the Commissioner with any special discretionary power to re-

define or determine the fact as to existence of employer-employee relationship in such situation as exists in these cases is claimed to exist, and on examination of those statutes no express grant of such power to the Commissioner appears at any place.

The narrow confines of situations where the special powers of "administrative discretion" referred to in *Williamsport Wire Rope Co. v. United States*, supra, create an exception to the general rule as to reviewability of the Commissioner's fact determinations were made clear in *United States v. Jefferson Electric Manufacturing Co.*, 291 U. S. 386. In that case the government claimed finality for the Commissioner's decision rejecting a claim for refund because the statute in question (creating a right of refund of automobile accessory manufacturers' excise taxes) required the refund claimant to "establish to the satisfaction of the Commissioner" various facts, including the fact that the taxpayer had not passed on the tax at time of resale. On the question of the meaning and effect of that special provision of the act, the court said:

> "Only by inadmissible straining could it be held to invest the Commissioner with absolute authority or discretion with respect to such refunds."

In support of its position according finality to the Commissioner's fact decision, the Government-Respondent argues that because taxpayers "knowingly" executed the Form B contracts they "should not be able to require the government to disregard the obligation . . . undertaken" (p. 21) and should not "be in a position to insist that the Treasury disregard the contracts into which they have entered." (p. 19).* It is true that Petitioners signed the

* The *exact* legal theory of Respondent is left indefinite and uncertain by the government's brief. Neither estoppel, waiver, nor any other affirmative defense was ever plead or relied upon in the lower courts and therefore obviously could not be effectually asserted in this court.

Form B contracts and knew what the terms and provisions thereof were. No one doubts that there was thereby permitted to come into existence an item of evidence which, *if considered alone and apart from all other relevant facts and circumstances*, would warrant and justify the conclusion that Petitioners became and were employers.

If it be the duty of this Court to consider punitive measures, as the Government-Respondent's argument assumes, Petitioners must accept such punishment as fits the crime of having unwillingly* signed a contract which, as was expressly found by the trier of fact, "was not entered into by fair negotiation between the parties" and was not intended by either contracting party to accurately set forth their respective rights and responsibilities. (R. 663). But, if it be proper for this court to consider the question of what is proper punishment for the *unwilling* signers of the unreal fiction that is the Form B contract, what is appropriate to be done to the *other* contracting parties whose representatives devised, perpetrated and promulgated the misleading document and coerced *unwilling* Petitioners into signing?

The Commissioner would have this court accord him an *incontestable* "right to choose" to confer a tax immunity *reward* upon the party to the Form B contract who not only instigated, devised and promulgated that misleading and deceptive document but also coerced an *unwilling* other signatory party into signing. Thus, the situation presented in this very case is a striking example of the dangerous and frightening nature of the proposition contended for by Respondents.

Here, in ex parte hearings and conferences, the Commissioner was persuaded by representatives of Intervenor-Respondents to rule *in advance* that all orchestra engage-

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* At page 18, the government Respondent's brief concedes that the petitioners signed the contracts "unwillingly."

ments booked under the Form B contracts would result in tax liability of the ballroom establishments. (R. 575, 577, 578) It so happened that in this case, Intervenor-Respondents, through the power and influence of the American Federation of Musicians, were able to lawfully coerce *unwilling* Petitioners into becoming signatory parties to the Form B contract portraying an utterly unrealistic fiction. The Commissioner insists that, his approbation having been obtained, the ostensible arrangement purported to be created by the signatory parties is invulnerable to attack. It is self-evident that it is as likely to be labor as management which is in "the inferior bargaining position" * which the Petitioners happened to occupy in the instant cases. The rule which might conceivably momentarily please and bring flush of apparent victory to the spokesmen for a great and powerful labor union today could well become a frightful instrument of oppression and injustice in countless cases yet to arise.

The rule which the Respondents urge upon this court would transform the courts from their historic functions as a "haven of refuge for the weak and oppressed" to that of a potential accessory to oppression. It would confer upon the Commissioner the arbitrary power to assess and impose a tax upon whomsoever he and the contracting party who happens to possess superior bargaining power may together justly or *capriciously* decide.

Nor is the potion sought to be served rendered any more appetizing or less deadly because Respondent's brief gives abstract lip service to a disclaimer that "any general right to choose between possible taxpayers" is contended for. The substance and effect of the rule contended for is exactly that which is disclaimed. The Commissioner *did* choose between Petitioners and Intervenor-Respond-

* This is the government's own description of Petitioners' situation in the instant cases. See pp. 18-19, Government Brief

ents as to which should be taxed and which should be relieved of the burden of the tax in question. As taxpayers aggrieved by the Commissioner's choice, Petitioners, at their first and only opportunity to be heard, proved that the choice was made and the tax was exacted on account of an erroneous fact decision of the Commissioner. If the Commissioner's erroneous choice is permitted to stand, such decision can have no other meaning or effect than to invest the Commissioner with absolute and unqualified "right to choose between possible taxpayers." That such rule, if adopted and established by this court, would apply to and govern a horde of future determinations and decisions of the Commissioner is too clear for argument.

The cases cited by the Government-Respondents are not apposite. All of the cited cases, except one from outside the field of Internal Revenue laws (*Gray v. Powell*) involve the very narrow question of when the separate identity of a controlled corporation or a business trust will be recognized and made the basis for tax assessments and when it will be disregarded. The age old principle as to when the court shall look through the corporate entity was set forth in *New Colonial Ice Co. v. Helvering*, 292 U. S. 435, 442, as follows:

> "As a general rule a corporation and its stockholders are deemed separate entities and this is true in respect of tax problems. Of course the rule is subject to the qualification that the separate identity may be disregarded *in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights.*" (Italics ours)

The quoted rule was applied and adhered to in the quoted case and in the *Higgins v. Smith*, 308 U. S. 473, *Moline Properties v. Commissioner*, 319 U. S. 436, cases cited by the government brief. The opinions in each of

those cases make crystal clear that the grounds and theory upon which the corporate entity was disregarded was that the taxpayers had created *fictitious* and *unreal* paper set-ups to avoid their just tax obligations. This principle finds expression in the court's opinions as follows:

> "The government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation. It is command of income and its benefits which marks the real owner of property."
>
> *Higgins v. Smith*, 308 U. S. 473, 477, 478.

> "In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction."
>
> *Moline Properties v. Commissioner*, 319 U. S. 436, 439.

And the meaning and effect of the holdings in the above quoted cases was summarized in *Schenley Distillers Corp. v. United States*, 326 U. S. 432, 437 as that ". . . corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose."

Before and during the interval when the doctrine of the above mentioned cases was evolving and becoming established as a settled rule of law, there came before the court a number of cases involving the situation where a corporation wholly owned by a single stockholder was caused to be validly created and to function and operate as a corporation; and tax assessments predicated upon recognition of the separate legal identity of such corporations were resisted on the ground that the corporation, being solely owned, was a mere fiction which should be dis-

regarded. In each of these cases the court looked into the question of whether or not the corporation was validly created and functioning and, those facts being found to exist, the assessments were uniformly sustained. *Burnet v. Commonwealth Improv. Co.*, 287 U. S. 415; *New Colonial Ice Co. v. Helvering*, 292 U. S. 435, 441; *Moline Properties v. Commissioner*, 319 U. S. 436.

Whenever and as often as the rule of the *Higgins v. Smith* case was invoked, it was contended that the rule was inconsistent with that of the *Commonwealth Improv. Co.* case requiring the taxpayers to accept the tax burdens which the Revenue Laws imposed on account of the existence of the corporate entities which they created and employed to further their business purposes. Naturally, in distinguishing those cases, the court referred to the taxpayer's "choice of the advantages of incorporation to do business" and his "having elected to do business as a corporation" in its statement of the reasons why the assessments in question were proper and lawful. This language was appropriate because *corporations* cannot come into existence unless the incorporators and stockholders elect to create an artificial or fictitious person and, since the applicable Revenue Laws imposed taxes in recognition of the separate identity of the stockholders, the assessments in question constituted a proper application of the law to the determinative facts.

The cases involving corporate entities cited by the government are utterly devoid of language supporting any such conclusion as that "the right to make the choice . . . is the Commissioner's." The statement in *Higgins v. Smith*, 308 U. S. 473, 477, that "the government may look at actualities and *upon determination that the form employed* for doing business or carrying out the challenged tax event *is unreal or a sham* may sustain or disregard the effect of the fiction *as best serves the purpose of the tax*

statute" obviously was not intended to imply any special quality of finality or conclusiveness to the Commissioner's fact determinations. The other cited authorities are even wider off the mark.*

Only one of the cited authorities for what might properly be called the "Commissioner's incontestable right of choice" theory of the Government-Respondent involves any question other than that of recognition or non-recognition of corporate entities or business associations. The decision in that case (*Gray v. Powell*, 314 U. S. 402) makes very clear that the case involved an administrative body's fact finding with respect to "a matter left specifically by Congress to the determination of an administrative body" and this court held that there having been "a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner" *the exercise of the special power* vested by Congress in the administrative body should not be disturbed. The holding of that case comes squarely within the well recognized

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* *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, cited in the Government-Respondent brief, comes no nearer to the question under discussion than to raise the question whether, under the doctrine of the *Moline Properties* and the *Higgins v. Smith* cases, the separate corporate entity of a subsidiary corporation could be disregarded.

Edwards v. Chile Copper Co., 270 U. S. 452, 456 merely holds that a subsidiary corporation taxpayer involved in that case was engaged in business within the meaning of that term employed in a taxing statute. The opinion contains neither holding nor language throwing light on any question of the weight and effect to be given to the Commissioner's decision to levy a tax on the taxpayer.

Schenley Distillers Corp. v. United States, 326 U. S. 432, states the rule as to non-recognition of corporate entities to be that "while corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." The language of the opinion stating that the creator of the corporation "does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public" must be considered in the light of the holding of the court, *after reviewing all of the pertinent facts*, that the subsidiary corporation contracting with its parent and other subsidiaries was a "contract carrier."

exception to the general rule of non-finality of an administrative officer's decision where the decision is a "determination involving administrative discretion" such as Justice Brandeis referred to in his masterly statement of the rule in *Williamsport Wire Rope Co. v. United States.* (See p. 8 hereof). If further grounds for distinguishing the *Gray v. Powell* case are necessary, elements entirely lacking in the cases at bar affirmatively appear in that case as follows:

(1) The party sought to be charged was accorded a fair hearing and opportunity to present the facts to a quasi judicial tribunal.

(2) The party sought to be charged was "the creator of the plan" which was held to spell out liability.

(3) The case involved no question of administration of Revenue laws by the Commissioner of Internal Revenue in a manner consistent with and under the "system of corrective justice" provided by the Internal Revenue Laws of the United States.

In *Helvering v. Coleman-Gilbert Associates,* 296 U. S. 369, cited by the government, the court upheld findings of the Commissioner to the effect that a certain business trust was a business association taxable as a corporation. No finality or incontestability with respect to the Commissioner's original finding was either contended for or held by the court to exist. The Commissioner was upheld on the ground that his decision was *right* and not on the ground that the Commissioner's determination was incontestable. The entire text of the court's opinion shows a patient analysis by the court applying the applicable Revenue Law to the established facts. Read alone and apart from the remainder of the opinion, the excerpt quoted in the government's brief does not fairly reflect either the holding of the court or the thought intended to be expressed by the author of the opinion. The quoted

excerpt was nothing more nor less than forceful statement of a reason why a trier of fact might justifiably attach particular weight to the formal Trust Agreement willingly entered into by all interested parties.

Petitioners submit that, considered together with the entire context of the opinions in which they appear, the single sentence statements of this court quoted in the government's argument do not say and were not meant to imply that the Commissioner ever possesses an "incontestable right to choose" to treat any single evidential fact as conclusive of an ultimate fact required to be found as the basis for a lawful assessment where other and more weighty evidential facts require a contrary finding on the determinative ultimate fact. That this is even true when intricate questions of recognition or non-recognition of corporate entities are involved is clearly established by *Helvering v. Tex-Penn Co.*, 300 U. S. 481. In that case the Commissioner assessed income tax against the taxpayer as a result of his fact finding that the taxpayer received $350,000 cash, in addition to stock, in a corporation merger, the applicable section of the Internal Revenue Laws being to the effect that unless the sole consideration received was stock the transaction was a taxable transaction. The Commissioner's determination that $350,000 cash (in addition to stock) was received by the taxpayer was based upon the formal contract of the parties which, *on its face, clearly and unambiguously* stated the consideration for the transfer to be $350,000 and a stated number of shares of stock, and a formal resolution of the Board of Directors authorizing the contract and containing the same language reciting the consideration to be received. On the taxpayer's appeal, the evidence before the Board of Tax Appeals proved that, notwithstanding the contrary recitals in the formal contract sighed by the taxpayer and in the Board resolution, the parties to the contract did not

actually intend to pass anything other than stock as consideration and that in fact no cash did change hands as consideration for the property transferred by the taxpayer. The decision of the Board of Tax Appeals affirmed the Commissioner and, on appeal from a Circuit Court reversal of the Board, this court affirmed, saying:

> "In form the documents upon which the Board of Tax Appeals relied stated that the $350,000 was corporate consideration passing from Transcontinental, but in fact, it was not, and the rule is well established that in determining tax liability, taxing authorities *must* look through form to fact and substance. * * *
>
> "The validity of the ultimate finding * * * is to be tested by what is in fact done rather than by the mere form of words used in the writing employed. * * *
>
> "As against the board's findings showing what was actually done in consummation of the transaction, no weight as evidence can be given to mere recitals, directions, engagements and admissions of respondents contained in the documents relied on by the board. It should have held that the Transcontinental Stock was the sole consideration for the transfer of the Tex-Penn assets. The Circuit Court of Appeals rightly held that the ruling to the contrary was erroneous." (Italics ours)

Progressively, as the true import and meaning of the government's "incontestable right of choice" theory is thought over and analyzed, any thoughtful student will come to recognize that the short paragraph in the dissenting opinion of Judge Gardner below (R. 708) dealing with the question under discussion was masterly and profoundly wise. Petitioners respectfully submit it as a perfect summation of the principles sought to be made clear in this division of brief.

> "What Congress has commanded to be taxed must be taxed. Here the statute taxes employment and

nothing else. Both the Commissioner and the taxpayer are subject to the statute and can not by adopting a fiction of the parties shift the burden of tax from those upon whom Congress has placed it.".

II.

REPLY TO INTERVENERS' BRIEF.

A.

Correction of erroneous assumptions of interveners as to the issue presented and as to certain facts.

1.

The basic question in these cases is not whether the leaders could become the employees of the petitioners but whether under all of the facts of this record the leaders were the employees of petitioners.

Interveners seek to inject a pseudo issue into petitioners' controversy with the government by stating:

> "The basic question in this case is whether interveners could contract to perform their services as the employees of petitioner or whether they, as against their will, were required by law to perform their services only as independent contractors." (P. 4, Interv. Brief)

> "This poses the fundamental question involved in this case, namely, may a person require as a condition employment that he occupy the status of an employee of the one for whom he is to perform services, or is a person required to perform work for another only in the capacity of an independent contractor even though he expressly refuses to work in any other capacity than that of an employee?" (P. 17, Interv. Brief)

The foregoing statements are incorrect statements of the real issue in these cases because each assumes, contrary to the findings of the trial court and the undisputed record supporting such findings, that the leaders were unwilling to perform their engagements as independent contractors but intended that such performance was to be solely in the capacity of an employee. The trial court in its third finding (R. 663) expressly found that the parties at the time of the execution of the Form B contracts did not thereby intend to transfer the right of control over the members of the orchestras and the method and manner of doing the work from the leaders to the ballroom operators. The trial court in its first finding further found the leaders "exercised entire direction and control, and the right of control over their orchestras and the members thereof, and the method and manner of doing the work", and that each leader "exercised and had the exclusive right to hire and fire such members, to contract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances." The court also found that "Such leader organized, managed and controlled such orchestra as an independent organization for hire and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes." (R. 662, 663)

Aside from the question of contestability of the Commissioner's original fact determination, the real question before this court is the same one that was before the Circuit Court, namely, was there substantial evidence to sustain the findings of the trial court. This being true, all of interveners' argument as to whether the leaders can be required to perform their engagements as inde-

pendent contractors against their will is wholly beside the point.

Petitioners, having devoted a substantial portion of their main brief (pp. 48 to 84) to a detailed review of the abundant evidence supporting the above mentioned findings of the district court, will not repeat that evidence here. It is adequately summarized by Circuit Judge Gardner in his dissenting opinion (R. 707, 708) as follows:

> "The evidence is clear and convincing that the leaders exercised complete control of the means and manner of performance. They and they alone had the right to hire and fire; they and they alone determined the wages of the sidemen; and they and they alone actually paid the sidemen. The leaders were conducting an enterprise for profit, building up a name and reputation for themselves and their orchestras. The findings of the trial court that the leaders were in fact the employers is sustained not only by substantial evidence but by convincing proof. In fact a finding that the contract correctly reflected the relationship of the parties would, I think find no support in the evidence."

With commendable candor the government brief comments on this evidence in the following language:

> "The leader hired and fired the other musicians (known as 'sidemen') and determined their compensation, which was never less, but might be more, than the Union scale. (R. 136, 358) The leader paid the sidemen out of the sum received for the engagement from the petitioners and other ballroom operators. The leaders also paid transportation, agents' commissions, and other expenses out of this sum. (R. 135-136, 167-168) Any excess remaining was retained by the leader as profit; if there was a deficit the loss was borne by the leader (R. 137-138, 168)." (Govt. brief pp. 3, 4)

It is submitted that the leaders' retention of three of the most important attributes of an employer, namely, the right to hire and fire the men working under them, the

right to determine and pay their wages, and the right as entrepreneurs to reap a profit or incur a loss from their performance, shows beyond question that the leaders were entirely willing to perform their engagements as independent contractors and not as employees of the ballroom owners. Interveners' statements that the leaders were unwilling to work and refused to work in any other capacity than that of an employee is not only entirely without support in the record but it is directly contrary to the record.

Interveners' contentions that the leaders did not have the right to determine, fix and pay the wages of the sidemen in their orchestras because the leaders were merely conduits or agents for the ballroom owners for the distribution of such wages is flatly contradicted by the undisputed testimony of the leaders and ballroom owners alike that the leaders fixed and determined the wages of the sidemen and the method of payment. (Al Menke R. 136-139, 158; Paul Moorhead R. 168; "Doc" Lawson R. 272, 278; Pltfs' Ex. B-30, R. 279; Griff Williams R. 360, 361, 367, 390, 391, 394, 630, 631; Bartels R. 65, 66, 98; Geer R. 324 and 326)

Even the leaders' signing of the Form B contract can not be considered evidence of their unwillingness to perform engagements except as employees of the ballroom owners because, as pointed out in petitioners' brief (pp. 92 to 95) the control granted by that contract related solely to matters pertaining to results to be accomplished and not to the details of the work to be performed, and the further fact that under still other provisions of the contract the leader is empowered to select the members of the orchestra and fix and determine their compensation.

In this same connection the court's attention is again directed to the numerous by-laws of the American Federation of Musicians made a part of the Form B contract.

These by-laws (reviewed pp. 74 and 75 of petitioners' brief) not only recognize the leader as possessing all the characteristic indicia of an employer but expressly prohibit the existence of an employment relationship between an establishment owner and the sidemen of the orchestra. The government concedes (p. 8 of brief) that "many of these laws clearly indicated that the members were to be employed only by leader-members and not by outsiders." If, as Interveners' counsel contends, the musicians throughout the country collectively, through their union "decided to give up all the advantages they might obtain by performing as independent contractors" (p. 18 of brief), why was it that this same union at its annual convention in June of 1941 and again at its annual convention in June of 1942 *re-enacted* all of these by-laws recognizing the leader as the employer of the sidemen (See pp. 81 and 82 of petitioners' brief) and, at the 1942 convention, the Union even added a new by-law expressly referring to the leader as "promoting his business", "borrowing money" and "owning bands?" (Interveners' Ex. 6, R. 601, 602, 592) Such conceptions as to a leader are utterly inconsistent with interveners' claim that the leaders, following the promulgation of the Form B contract, were unwilling to function as independent contractors.

2.

The record facts abundantly sustain the trial court's finding that the parties to the Form B contract never intended that it would operate to transfer right of control from the leaders to petitioners.

After referring to provisions of the Form B contract denominating the relationship between the ballroom owner and the orchestra members as that of employer and employee, interveners on page 16 of their brief state:

"That petitioner fully understood the implications of these provisions in the contracts prior to executing the contracts and that he understood that these provisions of the contract gave him the right to control the musicians in the rendition of their services and placed him in the status of an employer in his employment relationship with the musicians, is clear from his testimony, for he stated that he objected to employing the members of the orchestra severally (R. 109), he objected to being designated the employer (R. 109), he objected to having the full right of control over the members of the orchestra (R. 110) and he knew that the contract placed him in the status of an employer. (R. 120)"

So that the court will have no misunderstanding as to what Bartels was objecting, we quote from his cross examination:

Q. Mr. Bartels, at the outset of your direct examination, you said you protested this contract when it was submitted to you?

A. That is right.

Q. Did you use the word object to it?

A. That is right. (R. 108, 109)

* * * * * * *

Q. Now you read on further, I presume that they agreed to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams. Did you object to that?

A. I objected to it. Read the whole clause, it is not fair to take—

Q. I will read the whole paragraph. It says here: "That the employer employs the personal services of the employees as musicians severally, and the employees through their representatives agree to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams to only the terms and conditions."

A. I objected to the word "employer" in that contract. (R. 109)

Q. And you objected to the word "severally," that you were employing these men severally, is that right?

A. Well, you mean individually when you talk severally?

Q. Yes, that's right.

A. I—yes, I objected to that.

. . . . . .

Q. Now did you object to the part of the contract which says "The employer shall at all times have complete control of the services of each of the employees which render to the satisfaction—

A. I did want it—Pardon me. I deny always that I am the employer of those musicians. Mr. Williams brought his orchestra there. He hired those men.

Q. But you saw that in the contract.

A. Yes.

Q. And you objected to that?

A. Yes, sir. (R. 110)

The further testimony of Bartels clearly shows that his mind was put at ease as to those objections by the assurances then and there given to him by the leader's booking agent's representative, Mr. Breyley. Bartels' testimony in this regard was as follows:

> "I objected to the signing of this where they call me the employer, and Breyley says, 'Go ahead and sign it,' he said, 'it is just a change that has been requested by Petrillo, and', he says, 'it will give you no more power now than it was before.' He said, 'It won't change your status a bit.'" (R. 116)

Interveners claim that Breyley's statements are immaterial because he had no authority to vary the Form B contract. (p. 45 of brief) In making the statements in question Breyley was not varying the contract but merely inducing a state of mind in Bartels by giving his

opinion or interpretation as to its effect. In this connection it should be borne in mind that Bartels, at another point in the record, testified that Breyley told him that Petrillo, as President of the American Federation of Musicians, had demanded the new contract and that the rules of the American Federation of Musicians be made a part thereof. (R. 119) Bartels also testified that he knew that these rules "say the orchestra leader is the employer of the sidemen." (R. 120) Being uncertain as to what the Form B contract with its conflicting recitals really meant, he did what any normal person in his position would have done. He voiced objections to the booking agent who was negotiating the engagement and received assurances that the objectionable provisions were not intended to have any practical effect. Certainly he had every reason to rely upon Breyley's statements. This reliance was particularly justified and reasonable because he already knew that the by-laws of the American Federation of Musicians made the leader the employer of the orchestra members. (R. 119) The important fact of Bartels' reliance upon Breyley's apparently authoritative interpretation is made very clear by his cross examination testimony, as follows:

> Q. In other words, you didn't believe Mr. Breyley when he said it didn't make any difference and your status remained the same. Am I right about that?
>
> A. Yes, I took Jim's word for it.
>
> Q. Did you believe it did not change the status or did you believe that it did change the status?
>
> A. Oh, I didn't believe it did, no.
>
> Q. Well, did you believe it did not change the status, why did you object to it, if you believed that?
>
> A. Because I didn't want to be called the employer. (R. 121)

. . . . . .

Q. I want to know whether on June 25, 1941, when you signed the contract engaging the services of Paul Moorhead and his orchestra you understood that the terms of the contract were such that you assumed the obligations of an employer to the sidemen and the leader of your orchestra?

A. I never have. (R. 121)

Q. Answer the question.

A. No.

Q. You didn't believe that?

A. No.

* * * * * * * *

Q. Then you continued to sign contracts on July 7, 1941, on September 25, 1941, as well as July 12, 1941 and November 6, 1941, each with the same clause, is that correct?

A. Well, I think they are different contracts. I signed them, yes, I signed them.

Q. You signed them all?

A. But not as employer. I signed them because they insisted, I signed them but I denied I was the employer. (R. 122)

Petitioners submit that the foregoing record testimony of Bartels wholly refutes interveners' contention that Bartels "understood that the provisions of the contract gave him the right to control the musicians in the rendition of their services and placed him in the status of an employer in his employment relationship with the musicians." On the contrary this record testimony constitutes substantial evidence along with the other evidence set out on pages 89 to 92 of petitioners' brief, supporting the district court's third finding that "at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestra

or any of the sidemen, or the method or manner of doing its or their work in any particular." (R. 663) There being substantial evidence to support this finding, the Circuit Court of Appeals was without the power to make a contrary finding. (R. 691) *McCaughn v. Real Estate Land, Title & T. Co.*, 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879, and *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859.

B.

The rule that a written contract is not conclusive in determining the relationship of the parties is not confined to cases where the contract does not expressly vest the right of control in one of the parties.

Interveners assert (p. 19 of brief) that "the authorities cited by petitioners are concerned only with the factors that should be taken into consideration in determining who has the right of control over the services to be performed under a particular contract of hire, which does not expressly vest the right of control in either of the parties." They further assert (p. 22 of brief) that "where the agreement of the parties is definite concerning the question of the right of control, it is conclusive in determining the employment status of the parties."

At this threshold, Petitioners respectfully remind the Court that it is the Government that will live and work with the rule of law as to conclusiveness of such contracts as the Form B contract which is established through the decision of this case. The decision herein will likely govern and control in the administration of the social security acts for many years to come and its effects upon Interveners is as a drop of water in the ocean compared to its ultimate effects in the entire field of commerce and industry in which the rule here established will hereafter

be applied. In view of these circumstances, the Government's outspoken (even though it be belated) opposition to the rule contended for by Interveners as well as its clear-cut statements of reasons for taking that position should be accorded particular weight. For the convenience of the court we here set forth some of the pertinent statements of the Government on the question under discussion.

> "The court below * * * thought that the Form B contract shifted the right of control to the owners and *in and of itself* made them the employers. It is also suggested that in any event the Commissioner was not required to look through the contract at the instance of one of the parties to it. As will appear we are in accord with the second suggestion *but not as to the court's view of the conclusive nature of the contract.*" (Italics ours) (Government Brief p. 14)

> "We agree that significance attaches to the right of control and not merely to control actually exercised. But we do not regard that factor as all-conclusive when other factors point toward a different employer, particularly when it appears that actual control is in almost every important respect exercised by someone else.
>
> "If we assume, however, that the right to control alone need be considered and that the contract gives that right to the owner, we still would not treat the contract as decisive when evidence as to conduct shows that in fact the contract does not conform to the relationship actually existing. In this field, as in others, it is important that the parties not evade their obligations by the use of legal documents which on their face do, but in fact do not, change the substance of a relationship." (Government's Brief, p. 15)

> "We contend only that it (the contract) is not in and of itself decisive when all other evidence points in a contrary direction.
>
> "As we have pointed out, the Court below conceded this to be true as to recitals in a contract, but not as to promises or covenants, which in themselves estab-

> lish obligations * * * But to attribute absolute binding force to such covenants would still permit the circumvention of legislative enactments through mere skill in drafting legal papers which bear little or no relationship to the actual management of the affairs they purport to describe. If attorneys were advised that although declaratory or descriptive recitals were insufficient, agreements that a particular person had or had not the right of control would avail, they would find little difficulty in adapting their writings to the latter rule." (Government's Brief, pp. 16, 17)

Reference to the authorities readily reveals why the Government adopted the position set forth in the foregoing quotations. Not a single one of the many authorities cited by Petitioners (pp. 20 to 23 of brief) reciting and applying the general rule of inconclusiveness of the parties' contract hints or suggests in any way that the general rule is limited only to cases where the contract fails to specifically state the party in whom the right of control is vested. On the contrary the authorities referred to clearly indicate that just the reverse is true. For example, in both *Spillson v. Smith*, 147 F. 2d 727 (C.C.A. 7th) and *Anglim v. Empire Star Mines Co.*, 129 F. 2d 914 (C.C.A. 9th) the contract contained covenants purporting to create express obligations and yet the court, in each case, laid down the broad general rule in identical words as follows:

> "The law is well established that the employer-employee relationship is to be judged by the presence or absence of no single evidentiary factor but by an over-all view."

Interveners' contention as to the limited scope of the rule in question is squarely refuted by the holding of the Fourth Circuit Court of Appeals in *Gulf Refining Co. v. Brown*, 93 F. 2d 870, where the contract specifically provided that the "consignee should have entire charge of the management and operation of the business," which pro-

vision is certainly the equivalent of a clause expressly vesting the right of control in another. The court, however, applied what is referred to as "the non-exclusive tests" of an employment relationship as set out in Section 220 (2) of the Restatement of the Law of Agency. This decision furnishes striking proof of the error of the assertion made by interveners' counsel (p. 21 of brief) that this section of the Agency Restatement applies only to contracts in which "the extent of control" is not clearly indicated and thus is in dispute. The language of the section plainly shows that there is no justification whatever for ascribing any such limitation to the agency restatement rule.

Interveners' contention is also refuted by *Wabash R. R. Co. v. Finnegan*, 67 F. Supp. 94 (E.D. Mo.), wherein three contracts expressly provided that the contractor should supervise and exert authority over the workmen in the performance of the services. The court nevertheless held that these contracts were not conclusive and did not preclude consideration of such factors as the method of payment, who actually supervised the work, who furnished the tools and whether the contractor was engaged in an independent business. These are some of the very factors to which the district court gave consideration in the cases at bar. The Missouri district court in its opinion held that "such contracts can not serve to prevent fixing of the tax on the substance of the relationship, rather than the name the parties choose to give it", citing *Matcovich v. Anglim*, 9 Cir., 134 F. 2d 834.

In *Matcovich v. Anglim*, supra, *Willard Sugar Company v. Gentsch*, 59 F. Supp. 82 (N.D. Ohio) and *Royal Theatre Corporation v. United States*, 66 F. Supp. 301 (Kan.), the Courts found upon a consideration of all the facts that the right of control was in one of the parties notwithstanding an express recital in the contract denying that right

to such party. Nothing appears in the opinions in these cases which implies or suggests that the rule is any different in cases where the covenant respecting the right of control is an affirmative one. As the government brief points out (pp. 16 and 17), sound public policy requires that the rule be the same in both cases.

While it is true that the contract in *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th) did not contain a clause purporting to vest the right of control in one of the parties, the court did not in any way indicate that the five factors which it said (p. 132) had a material bearing on the right of control would lose their efficacy in a case involving such a contract. As petitioners pointed out in their main brief (p. 31), such factors are no less potent as affecting the right of control simply because the form of contract purports to place that right in one of the parties.

C.

The decisions holding that a contract is not conclusive of a relationship are not based on a finding that the parties by their conduct either abrogated or abandoned the contract or substituted a different agreement.

Interveners (pp. 23 to 25) seek to distinguish Petitioners' cases cited in support of the rule that a contract is not conclusive by claiming that in those cases the courts found that the parties either "abrogated" or "abandoned" the contract or "substituted a different agreement". An examination of the opinions in each of those cases reveals that those decisions were not based on any such grounds. On the contrary such examination shows that the courts considered that the contracts, as such, had not been abrogated, abandoned or rescinded by agreement.

For example, in *Commissioner v. Tower*, 327 U. S. 280, 66 S. Ct. 532, 90 L. Ed. Adv. Op. 559, one of the cases relied on by petitioners, the opinion made clear that the contract created a valid partnership under the laws of Michigan but proceeded to hold that the question of whether the parties intended a "genuine union for partnership business purposes" was still "a question of fact, to be determined from testimony disclosed by their agreement, considered as a whole, and by 'their conduct in the execution of its provisions.'"

Likewise, in *Doll v. Commissioner*, 149 F. 2d 239, another of the cases cited by petitioners, the Eighth Circuit Court of Appeals, after observing that "we have here a written instrument which is sufficient to create a partnership, both at common law and under Missouri decisions," stated:

> "The existence of such contract is not determinative of this tax issue. There remains the impact of the test of an analysis of 'all the circumstances attendant on its creation and operation.'"

The court's attention is also directed to the case of *Royal Theatre Corporation v. United States*, 66 Fed. Supp. 301 (Kan.) where the court did not find that the contracts defining one Fite's status as that of independent contractor were abrogated or abandoned or a new agreement substituted in their stead, but held that "'the declarations in the contracts that Fite was not an employee and that he was not to be controlled by the plaintiffs" were not of great probative value. The court then proceeded to consider the conduct of the parties both before and after the contracts and found that "Despite Fite's desire to claim, for tax purposes, the status of independent contractor, he was unwilling to assume the responsibilities of such status."

In the cases at bar the district court did consider the

conduct of the parties, not for the purpose of determining whether the Form B contract was subsequently abrogated or abandoned or a different agreement substituted in its stead, but for the purpose of determining whether the parties actually ever intended to create the genuine relationship of employer and employee between the ballroom owners and the orchestra members. In so doing, the trial court acted strictly in accord with the unanimous view of the authorities, and the Circuit Court of Appeals was clearly in error in holding that the trial court should have confined its inquiry to the Form B contract and the question of whether it was subsequently abrogated or abandoned by the parties.

D.

The so-called rulings of the commissioner on fragmentary facts and on account of ex parte conferences with interveners' representatives did not purge the Form B contract of its character as "an anticipatory arrangement" to escape taxes.

Interveners contend (pp. 48 to 52) that the Form B contract was not an anticipatory arrangement to escape taxation because of the blessing given it by certain rulings of the Commissioner of Internal Revenue. The record shows and the government now concedes (p. 21 of brief) that all the Treasury Department had before it when it made its rulings was the contract itself. As the government points out,

> "The Treasury did not have before it facts showing, and was not required to assume, that the changed status established in the contract would not be reflected in actual operations." (p. 21 of brief)

Since the record in the present cases establishes beyond question facts showing that the changed status ostensibly established by the Form B contract was not reflected in the actual operations of the parties, the rulings of the Commissioner mentioned by interveners can have no possible bearing as to whether the Form B contract was an anticipatory arrangement to enable the leader to escape taxation, which is what the trial court in his second finding (R. 663) found that it was.

At most, the so-called rulings of the Commissioner were merely letters expressing an opinion to the effect that the Form B contract appeared to be an efficacious arrangement to relieve the leader from the payment of social security taxes. *Langstaff v. Lucas*, 9 F. 2d 691 (W.D. Ky.) and *Bowers v. West Virginia Pulp & Paper Co.*, 297 F. 225 (C.C.A. 2d). There have been many cases where a Commissioner has approved a taxpayer's arrangement as making a transaction non-taxable and then later the same Commissioner or his successor has changed his mind and imposed the tax (just as the Commissioner twice changed his mind regarding the status of orchestra members performing engagements under contracts prior to the Form B contract). The courts have invariably held in such cases that the taxpayer was none the less liable, notwithstanding the Commissioner originally sanctioned the arrangement, *United States v. La Soviete Francaise De Bienfaisance Mutuelle*, 152 F. 2d 243 (C.C.A. 9th), certiorari denied, ... U. S. ..., 66 S. Ct. 820, 90 L. Ed. Adv. Ops. 731, *Sweets Co. v. Commissioner*, 40 F. 2d 436 (C.C.A. 2d), *Radiant Glass Co. v. Burnet*, 60 App. D.C. 351, 54 F. 2d 718, *Langstaff v. Lucas*, supra.

E.

The rule that a taxpayer may lawfully change his status to avoid taxation has no application to the present cases wherein the undisputed record shows the conduct of the parties, following the advent of the Form B contract, remained unchanged.

In reply to interveners' argument (pp. 52 and 53) that the rule announced by this court in *Gregory v. Helvering*, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, applies to the present cases, we need merely refer to the holding of this court in *Commissioner v. Tower*, 327 U. S. 280, 66 S. Ct. 532, 90 L. Ed. Adv. Op. 559, that such rule has no application to a situation where the conduct of the parties, following the adoption of the contract, remains unchanged from what it was before. This appears in the language of the opinion, as follows:

> "Respondent contends that the Tax Court's holding that he is taxable for the profits from the partnership is contrary to a principle long recognized by this Court that 'The legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.' *Gregory v. Helvering*, 293 U. S. 465, 469. We do not reject that principle. It would clearly apply, for example, in a situation where a member of a partnership, in order to keep from paying future taxes on partnership profits and in order to get into a lower income tax bracket sells his interest to a stranger, relinquishing all control of the business. But the situation is different where the taxpayer draws a paper purporting to sell his partnership interest even to a stranger, though actually he continues to control the business to the extent he had before the 'sale' and channels the income to his wife. Then a showing that the arrangement was made for the express purpose of reducing taxes simply lends further support to the inference that the husband still controls the income from his partnership interest, that

> no partnership really exists and that earnings are really his and are therefore taxable to him and not to his wife. The arrangement we are here considering was of the type where proof of a motive to reduce income taxes simply lent further strength to the inference drawn by the Tax Court that the wife was not really a partner. See Paul, Selected Studies in Federal Taxation, 2d series, pp. 293-300. To rule otherwise would mean ordering the Tax Court to shut its eyes to the realities of tax avoidance schemes."

The facts of the present cases bring them clearly within the above holding of this court. The undisputed evidence shows (R. 102, 139, 253, 277, 327, 364, 365) and the government now concedes (p. 9 of brief) that in actual practice the conduct of the parties was the same after the advent of the Form B contract as it was before. This being true, the showing in the present case that the contractual arrangement was made for the express purpose of relieving the leader from the responsibility for the payment of social security and employment taxes lends further support to the inference also amply sustained by other evidence that the leaders were still the employers of the sidemen of their orchestras notwithstanding the provisions of the Form B contract.

F.

The Form B contract itself expresses a primary intention that, in the event of a conflict between the by-laws of the American Federation of Musicians incorporated therein and its other provisions, the by-laws shall be controlling.

The Form B contract provided that "all the rules, laws and regulations of the American Federation of Musicians * * * are made a part of this contract." (R. 13) The government brief (p. 8) concedes that "Many of these laws

clearly indicated that the members were to be employed only by leader-members, and not by outsiders." Petitioners respectfully refer the court to pages 77 to 81 of brief for a fuller statement of the reasons why the letter of May 1, 1941, of James C. Petrillo, President of the American Federation of Musicians, did not constitute an implied repeal of these by-laws.

Interveners argue (p. 47 of brief) that these by-laws were not a part of the Form B contract because they conflict with its main purpose as revealed by the clause purporting to vest the right of control in the ballroom owners, and state:

> "It is a well settled rule of contract interpretation that a contract will be interpreted to carry out the intention of the parties and in the event of conflict in the provisions, the contract will be interpreted to carry out its main purpose."

We have no quarrel with the foregoing statement of the general rule of contract interpretation but we take issue with interveners' application of it to the present case. The intention of the contract to cause the by-laws to be paramount and controlling over any other provision is clearly and emphatically expressed in the provision that "the musicians performing services under this contract must be members of the American Federation of Musicians and *nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.*" (Italics supplied). A construction of the contract which makes the sidemen the employees of the ballroom owners obviously interferes with their obligation under the by-laws to accept employment only from leader-members. Accordingly, the court should follow the contract's own mandate and resolve this conflict in favor of its by-law provisions.

It was exactly on this ground that the District Court

in *Spillson v. Smith*, (N.D. Ind.), C. C. H. Unemployment Ins. Service, Vol. 1, 9111, refused to give effect to provisions of a prior form of contract adopted by the musicians' union for the purpose of making the establishment owner the employer of the orchestra members. This clearly appears from the court's finding that:

> "But the tenor of those parts of the contract for that purpose are inconsistent with the clause therein binding the members of the Federation playing under said contract to all the obligations to the Federation of Musicians and the provision therein that 'nothing in this contract shall be so construed as to interfere' therewith."

The court then proceeded to hold that the effect of the Federation by-laws incorporated by reference into the contract was to make the orchestra leader, and not the establishment, the employer of the sidemen. The decisions of *Williams v. United States*, 126 F. 2nd 129 (C.C.A. 7th) and *Los Angeles Athletic Club v. United States*, 54 F. Supp. 702 (S.D., Cal.) are in accord with this holding.

G.

Interveners' contention that the parol evidence rule applies to the present cases is not sustained by the authorities.

Notwithstanding the holdings of both the district court (R. 662) and the Circuit Court (R. 690) that the parol evidence rule does not apply in an action involving a stranger to the contract, interveners nevertheless argue (pp. 54 to 56 of brief) to this court that such rule is applicable to the present cases. The case of *American Crystal Sugar Co. v. Nichols*, 124 F. 2nd 477 (C.C.A. 10th) cited by interveners on page 56 of their brief does not support their argument

but instead refutes it, as clearly appears from the court's statement in its opinion as follows:

> "The courts of Utah, in accordance with the great weight of authority, hold that the rule applies only in controversies between parties to the instrument and those claiming under them. *Here, the United States was a stranger to the contract. It asserts a tax liability, not a claim derived from either party to the contract, and it could not invoke the parol evidence rule.*" (Italics supplied)

Other authorities holding that the parol evidence rule does not apply in a controversy between one of the parties to a contract and the government are as follows:

Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755.

Curran v. Commissioner, 49 F. 2d 129 (C.C.A. 8th).

Indianapolis Glove Co. v. United States, 96 F. 2nd 816 (C.C.A. 7th).

United States v. Title Guarantee & Trust Co., 133 F. 2d 990, (C.C.A. 6th).

H.

Independent contractors are not employees within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

The District Court (R. 656) and the Circuit Court of Appeals (R. 685-687) each accepted the test set forth in the Treasury Department's regulations (Reg. 106, Sec. 402.204 and Reg. 107, Sec. 403.204) for determining who is an employee within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. These regulations expressly provide that in order for a person to be such an employee the relationship between him and the person for whom he performs services must

be the legal relationship of employer and employee and that "an individual performing services as an independent contractor is not as to such services an employee."

Interveners argue (pp. 58 to 64 of brief) that this court should reject the test which was provided in the Commissioner's Regulations and applied by both courts below, and hold that the term "employee" as used in the social security and federal unemployment tax acts includes independent contractors. The supporting argument is that the term "employee" should be interpreted in the light of what are claimed to be the broad social objectives of those enactments, similarly as the National Labor Relations Act was construed in *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170.

At the outset, we respectfully direct the Court's attention to government counsel's statement (p. 12 of brief) on this question as follows:

> "In the instant cases we do not get much help by referring to basic statutory objectives. For whoever is the employer * * * either the leader or the owner is the employer—the sidemen are accorded Social Security protection."

In support of their contention that the term "employee" as used in Social Security legislation should be so broadly construed as to fasten the tax liability upon Petitioners irrespective of whether or not the orchestra members were their employees, Interveners cite and quote from the report of the House Ways and Means Committee reporting the bill known as the 1939 Amendments to the Social Security Act stating the Committee's conclusion that the coverage of the act should not be confined to those encompassed in the common law concept of master and servant. The content of the original bill which occasioned the statement made in the quoted excerpt from the Committee report was the provisions of Amendments 97 and 98 which

sought to redefine the term "employee" and broaden the coverage of the act so as to include insurance salesmen and other persons held by the courts to be not covered by the act because not employees. The proposed amendments 97 and 98 were deleted from the bill before final passage and therefore the record is that the very proposal recommended by the Committee report quoted by Interveners' brief was rejected by Congress. (P. 14 Report No. 1461, 76th Congress, 1st Session) It thus appears that, with full knowledge and information of the fact that the Courts were uniformly confining the coverage of the act to employees as defined at common law, the Congress refused to broaden or change the coverage originally provided by the act.

The decision in the *Hearst Publications* case falls far short of warranting the levying of social security taxes on Petitioners in the cases at bar. The court's opinion in that case took special pains to make clear that persons who perform services for another *as entrepreneurs* are excluded from the purview of that decision, using the following language:

> "Congress had in mind a wider field than the narrow technical legal relation of 'master and servant,' as the common law had worked this out in all its variation, and at the same time *a narrower one than the entire area of rendering service to others.* The question comes down, therefore, to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, *and what is clearly entrepreneurial enterprise and not employment.*" (Italics supplied)

That the leaders of the orchestras in the present cases were conducting an "entrepreneurial enterprise" is now conceded by the government by its statement (p. 13 of brief) that "the leaders of the name bands in the cases before the court certainly have the normal attributes of the en-

trepreneur." The court is respectfully referred to petitioners' main brief (p. 62) where it is pointed out that the leaders in the present cases possessed all of such attributes in that (1) their work required the exercise of independent judgment and professional skill; (2) each held himself out as available to the public generally; and (3) each stood to make a profit from the work of the men under him.*

Interveners' statement (p. 62 of brief) that they do not operate businesses is refuted by their own union's by-law expressly referring to a leader's right to borrow money "to promote his business." (Interveners' Ex. 6, R. 601, 602, 592) It is also refuted by the undisputed record evidence reviewed in detail on pages 61 to 70 of petitioners' brief showing that each of the leaders in the instant cases was engaged in an independent business for profit. (Interveners' Ex. 6, R. 601, 602, 592) And it is again refuted by the numerous court decisions cited on pages 86 and 87 of petitioners' brief ascribing to orchestra leaders the status of entrepreneurs. One of those decisions, *Williams v. United States*, 126 F. 2d 129 (C.C.A. 7th), is an express adjudication that Griff Williams, one of the interveners herein, was an enterpreneur engaged in an independent business for profit. (See p. 133 of 126 F. 2d)

Interveners' statement (p. 63 of brief) that the leaders "can not suffer a loss on any employment" is directly contrary to the testimony of the leaders themselves that whenever the receipts from an engagement were not sufficient to meet the salaries of their sidemen and the other expenses of the orchestra, the leaders stood the loss. (R. 138, 277, 362)

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* Interveners' statement (footnote p. 64 of brief) that Tiny Hill received but $15.00 for his engagement is incorrect. The record shows that in addition to this sum, Hill received $123.68 which he stated would be used to pay various expenses that may arise from time to time in the "operation of this enterprise" and that any excess amount at the end of the fiscal year would be charged to "Harry Hill's personal income and income tax made out accordingly." (Pltfs' Ex. A-1, R. 99, 100, 98)

Interveners' contention that independent contractors are employees within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act is further answered by the following decisions of Circuit Courts of Appeal rendered since the decision of this court in the *Hearst* case: *United States v. Aberdeen Aerie No. 24*, 148 F. 2d, 655 (C.C.A. 9th); *McGowan v. Lazeroff*, 148 F. 2d 512 (C.C.A. 2nd); *Glenn v. Standard Oil Co.*, 148 F. 2nd 51 (C.C.A. 6th); *Spillson v. Smith*, 147 F. 2d 727 (C.C.A. 7th); *Greyvan Lines, Inc. v. Harrison*, 156 F. 2d 412 (C.C.A. 7th); and *United States v. Silk*, 155 F. 2d 356 (C.C.A. 10th). All of the foregoing decisions uniformly hold that independent contractors are not employees for social security and employment tax purposes.

The case of *United States v. Vogue*, 145 F. 2d 609 (C.C.A. 4th) and *Grace v. Magruder*, 80 U. S. App. D.C. 53, 148 F. 2d 679, cited by interveners (pp. 60 and 61 of brief) do not hold that an independent contractor is an employee for social security and employment tax purposes. In the *Grace* case, supra, which involved the status of coal hustlers, the court expressly stated (p. 681 of its opinion), "We conclude that these persons are not independent contractors." The *Vogue* case, supra, involved the status of "seamstresses" referred to by the court as "humble employees" to whom the law of independent contractor "was never intended to apply."

For the reasons above set forth petitioners respectfully submit that it persuasively appears that the tax levying statutes here involved are not intended to apply to or impose a tax upon the wages paid to any one other than an employee, and, the orchestra members not being employees of petitioner, the taxes in question were unlawfully exacted from them. Also, that even if the court should hold the Social Security Act to encompass a broader coverage than the common law concept of employee, the

taxes in question were nevertheless unlawfully exacted because the uncontradicted record facts conclusively prove that the leaders, as entrepreneurs, were the persons for whom the services here involved were rendered.

I.

The record evidence persuasively indicates that if the fictions of the Form B contract were to be considered determinative the task of administering the social security laws would be rendered more difficult rather than simplified.

The Government brief gives "faint praise" to Interveners' suggestion that acceptance of the Form B contract as determinative of the actual employment situation would simplify the administration of the Social Security Acts by saying that "the primary advantage to the Treasury in relying on the contract is its definiteness". (p. 22) This statement should be considered in conjunction with the statements in the Government's brief in opposition to the petition for certiorari as follows:

> "The Solicitor General authorized appeal to the Circuit Court of Appeals because the decision of an appellate court seemed advisable as to the effect of an industry-wide contract provision, and because in any event the intervening leaders in No. 731 intended to appeal." (p. 6)
>
> *"From an administrative standpoint there is no special advantage in collecting the tax from the establishments in which an orchestra plays one night stands rather than from the leader for whom the musicians work steadily."* (p. 7) (Italics ours)

The record in this case indicates some of the administrative difficulties which would result from adopting the fictions of the Form B contract as the basis for assessing

the tax. It shows that the revulsion of the leaders themselves to the unrealistic fictions set up by the Form B contract caused them to consistently misstate and understate to Petitioners the actual compensation paid to the sidemen. The leaders were commanded by Petrillo to specify on the back of the Form B contract the pay to be received by each sideman on the occasion of a single night engagement still days, weeks or months away at the time the contract is signed. In fairness to the leaders involved it should be borne in mind that the drafters of the Form B contract apparently were so engrossed in perfecting an "on paper" case that they did not realize how impossible it would be for the leaders to say in advance how much pay each musician would receive for a *single* night's work when the leader pays *weekly* salaries and usually doesn't know exactly how many nights in any week that his orchestra will play. Consequently, in those few instances when leaders such as Paul Moorhead and Al Menke did bother to furnish any listing of the sidemen and their pay, they protected themselves against trouble with the local union by filling in amounts exactly corresponding to the minimum local union rate (Pltfs' Ex. B-6 to B-24, R. 177 to 251, 176 and Pltfs' Ex. B, R. 147, 140, R. 325 and 161) and let it go at that. In each instance the amounts specified by the leaders were less than the actual pay and the actual rate of pay of the individual sidemen whom they listed. (Pltfs' Exs. B-6 to B-24, R. 177 to 251, 176, 258; Pltfs' Ex. B, R. 147, 140 and 136)

This record irrefutably reveals the Form B contract as such a monstrosity as to make it virtually impossible for the Treasury Department to perform its function of collecting the amount of tax intended to be collected and credited to the social security accounts of the hapless sidemen of traveling orchestras. This being the entire record of this case insofar as it sheds any light on the question

of the administrative problems resulting from the compulsory use of the Form B contract and the government's acceptance of it as determinative of the employer relationship question, there is certainly no reason to believe that the Form B contract is the answer to a Commissioner's prayer for an effortless and evasion proof tax collection instrumentality.

CONCLUSION.

It is respectfully submitted that the propositions and arguments asserted by Respondents, when fairly analyzed and carefully weighed, come far short of sustaining the decision of the court below. For the reasons urged in Petitioners' brief and this reply brief, the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS, RESPONDENTS.

No. .....

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, RESPONDENT

BRIEF OF INTERVENERS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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BRIEF OF INTERVENERS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Preliminary Statement

This brief in opposition to Petition for Writs of Certiorari is filed severally by Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, who, individually, intervened as parties defendant in the United States District Court in the case of Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d/b/a Crystal Ballroom vs. E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa. The basis for the intervention of Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead was that the employment status of each of these interveners in his employment relationship with petitioner Bartels was put in issue in this case. If Bartels could be found not to have been the employer of any particular intervener, that intervener would be liable for the taxes paid by Bartels on the particular engagement involved (R. 20, 22, 25, 27, 30 and 33).

At the beginning of the trial of the case of Bartels, et al. vs. Birmingham, Collector, the case was ordered consolidated for trial with the case of Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms vs. E. H. Birmingham, Collector (R. 49). Although the legal issue in each case was similar, the testimony concerning the relationship between Larry Geer and the various musicians he employed in the furtherance of his ballroom business obviously cannot be relevant as evidence of the employment status of the

interveners in their respective employment relationships with Bartels. This brief therefore is concerned only with the respective employment relationships between Bartels and the individual interveners and is not concerned with the Geer et al. v. Birmingham case.

Even in the Bartels case the testimony concerning the status of any individual intervener cannot affect the employment status of any other intervener, for each intervener entered into a separate contract of employment with Bartels.

The Findings of the Trial Court were not Based on Credible Evidence and were in Contradiction of the Undisputed Evidence in the Case.

The basic and real issue in this case is, as stated by petitioner on page 14 of his petition, "Whether petitioners were the employers of the leaders and members of orchestras which performed engagements at petitioner's ballrooms within the meaning of Section 1426 (b) and 1607 (c) of the Internal Revenue Code. . . ."

These sections of the Internal Revenue Code do not define the term "employer" for the purposes of determining tax liability; however, the regulations promulgated under these sections of the Code by the Treasury Department (Treasury Regulations 106, Sec. 402.204; Treasury Regulations 107, Sec. 403.204) adopt the common law definitions and tests for resolving whether an employer-employee or an independent contractor relationship exists between one performing services and the one for whom the services are being performed.

Under the foregoing regulations petitioner would be liable for the taxes assessed against him only if he occupied the status of employer in relation to interveners under the tests applied at common law in tort actions.

There is no controversy between petitioner and inter-

veners, nor is there any conflict in court decisions or text books that the true and ultimate test for determining the common law distinction between employer-employee and independent contractor relationships is whose is the right of control over the services to be performed, not only as to the results to be accomplished, but also over the manner and means by which it is to be accomplished. **(Singer Manufacturing Co. v. Rahn,** 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440.)

The undisputed credible evidence conclusively establishes that the right of control over the services to be performed by interveners was in the ballroom owner, petitioner herein.

Petitioner Had the Full Right of Control over the Services Rendered by the Members of the Orchestras Lead by Interveners.

Each engagement involved in this case was performed pursuant to a particular contract known as the "Form B" contract (R. 83, 87, 91, 93, 95, 401). This contract intentionally, definitely and specifically spelled out an employer-employee relationship between the parties, not only by designating the ballroom owner, respondent, as the employer, but also by vesting in the respondent the full right of control over the services to be rendered. (Full contract set forth R. 87-89.)

There was no misunderstanding between the respective parties to the various contracts that the purpose and intent of these contracts was to clearly and unequivocally vest in the respondent the full right of control over the interveners and other musicians hired by respondent in the performance of their services under these contracts. This is made certain by petitioner's testimony that he read the contract, understood the contract and objected to the musicians submitting themselves to his control as he did not wish to assume the status of their employer (R. 104, 108,

110). Petitioner, nevertheless, entered into the contract after he was told that the musicians would render their services only as his employees.[1]

Petitioner's basic contention is that despite the uncontroverted testimony that the intent of the respective contracts of employment was to place the parties in the employer-employee relationship, the contracts did not establish in law the employer-employee relationship. Petitioner contends that the court should look to such elements as who actually exercised control over the services rendered, rather than who had the right of control; who furnished the tools (instruments); who arranged for transportation of the members of the orchestras to the ballroom; who rehearsed the orchestras; who originally formed the orchestra, [illegible] in order to determine the relationship between the [illegible]s. It is in this that petitioner errs as did the District [illegible]efore whom the case was tried.

[illegible]very case the contract of employment must be given controlling consideration if it actually expresses the intent of the parties, as it is a basic and elementary rule of law that the relationship between one performing services for another and the one engaging those services is determined by the contract, express or implied, pursuant to which those services are performed. (**American Jurisprudence**, Vol. 35, Sec. 8, p. 450; **Corpus Juris**, Vol. 1, Sec. 1, p. 33; **Younger v.**

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[1]Petitioner Bartels points out in his petition and brief the testimony of Bartels to the effect that on one occasion while he was negotiating for the services of an orchestra, the agent for the orchestra advised Bartels, petitioner, that the Form B contract was merely a form and would not place petitioner in the position of an employer. (Petitioner's Brief, p. 9.) There is no evidence that this happened to any other ballroom owner or other employer of musicians, nor is there any evidence that it occurred on more than the one isolated occasion. If such testimony can be held to vary the terms of the contract negotiated on that particular occasion, it can vary only the terms of that particular contract for the services of the one orchestra on the one occasion. In no way can this testimony vary or affect the other employment contracts involved. But the testimony shows abundantly that this contract was to create a status, that it was to be used by several thousand orchestras and that it was to be strictly adhered to. No testimony was advanced to show that the agent of the orchestra involved had authority to vary the contract.

Moore, 1355 S. W. (2d) 780; **Ruling Case Law**, Vol. 18, Sec. 3, p. 493.) Other factors should be considered only if they tend to show a variation from, or an abrogation of, the contract of employment. That is the law as expressed in the precedents cited by petitioner as well as by the Eighth Circuit Court of Appeals in the instant case.

For example, petitioner relies heavily on the case of **Spillson v. Smith**, 147 F. (2d) 727. In that case the contract did not contain any provision specifically designating which party should have the right of control in the performance of the work. The court found that Bergoff, the owner of the establishment for whom the work was performed " . . . had not the right to direct 'the details and means by which the result is accomplished.' Bergoff had not the right to say 'What shall and how it shall be done.' "

But, in the instant case, no court could find that petitioner did not have the right to direct the details and means by which the results were to be accomplished in the face of the contract of employment specifically and definitely giving that right to petitioner.

The case of **Williams v. United States**, 126 F. (2d) 129, was predicated on the same type of contract as was in evidence in the case of **Spillson v. Smith** (supra) and the decision of the court was to the same effect, namely, that from the facts involved the right of control was vested solely in the orchestra leader and that the contracts of employment did not vest in the establishments for whom the work was performed the right of control over the services to be rendered. The court based its conclusion squarely on the contract of employment, stating, "The status of the parties was plainly fixed by the contracts, including the rules of the Federation, and there is no room for argument that the establishments had any right of control." And in the **Williams** case, as in the instant case, there was no evidence showing any abrogation of the employment contract.

In the case of **Anglim v. Empire Star Mines Co., Ltd.**,

128 F. (2d) 914, the decision of the court was not in any way inconsistent with the decision of the Circuit Court of Appeals in the instant case. There the court found that the lessors of property had no right of control over the lessees under the terms of the leases, and there was no evidence in the record that the lessor-lessee relationship was abrogated in favor of an employer-employee relationship. Again the court looked first to the contract forming the basis of the relationship.

Matcovich v. Anglim, 134 F. (2d) 834, is basically to the same effect as the foregoing cases, the distinction being that in the **Matcovich** case the contract of hire specifically provided that the employees "shall not become subject to the control of the undersigned (employer)." In the **Matcovich** case the court considered the contract but found that the contract of employment had been abrogated. The facts revealed that the employer, Matcovich, actually exercised control over his employees.

In the instant case, though, there is no evidence at all that the interveners did not subject themselves to the full control of petitioner, nor is there any evidence that the contract was abrogated. On the contrary, the testimony is uncontradicted that interveners held themselves ready at all times to obey orders and be controlled by petitioner (R. 382, 383, 386, 387, 626, and 627).

In each of the foregoing cases relied on heavily by petitioner the court looked at the contract of employment to ascertain whether the type of relationship described in the contract had been established and then looked to the action of the parties to ascertain if the contract had been abrogated. But in each instance the contract of employment was the starting point.

That is all that was done by the Circuit Court of Appeals in the instant case. The court found by the uncontradicted evidence that the contract expressed the intent of the parties to establish the employer-employee relationship and that

there was no evidence of an abrogation of this contract.[2] The decision of the Circuit Court is not in conflict but is in conformity with the decisions cited by petitioner.

The mere fact that the interveners actually directed the orchestra in the performanc of their services for petitioner did not to any degree, nor in any way lessen the right of the employer under the terms of the contract to exercise the full right of control over the services to be performed and to either personally direct the musicians in the performance of their services if he chose to do so, or to instruct the respective leaders in the manner petitioner desired the services to be rendered. It is just the same situation as exists with a foreman who might direct skilled craftsmen in the performance of work which the employer of the foreman cannot himself properly direct And this is the error the Trial Court fell into, that is, th Trial Court found that because the skilled orchestra leader actually directed the musicians he was an employer rather than the ballroom operator who lacked the necessary skill to direct the work.

A failure to exercise control which an employer has a right to exercise does not make him any the less the employer. **American Jurisprudence**, Vol. 24, Sec. 3; **The Restatement of the Law of Agency**, Vol. 1, Sec. 22, p. 483, 489; **Treasury Regulations** (supra); **Williston, Contracts**, Vol. 3, Sec. 619, p. 1781; **Murrelle v. Industrial Commission**, 382 Ill. 128, 46 N. E. (2d) 1007; **Industrial Commission of Colorado v. Northwestern Mutual Life Insurance Co.**, 88 F. (2d) 560; **Sherlock v. Alling**, 93 U. S. 99, 23 L. Ed. 819; **Toplis & Harding v. Murphy**, 384 Ill. 463, 51 N. E. (2d) 505; **Peasley v. Murphy**, 381 Ill. 187, 44 N. E. (2d) 876; **McDermott's** case, 283 Mass. 74, 186 N. E. 231 (1933); **Claus v. De Vere**, 120 Neb. 812, 235 N. W. 450; **Simmons v. Kansas**

[2]There is no evidence in the record at all concerning the employment relationship between respondent and interveners Bill Carlsen, Tiny Hill, Boyd Raeburn and Buddy Fisher except their respective contracts of hire. Certainly, then, insofar as the employment status of these individual interveners are concerned, the contracts must be conclusive.

City Jockey Club, 334 Mo. 99, 66 S. W. (2d) 119; **Spencer v. Marshall**, 107 Kan. 264, 191 P. 468; **Jones v. Goodson**, 121 Fed. (2d) 176; **Griff Williams v. United States**, 126 F. (2d) 129; **McGraw v. Seigal**, 221 Iowa 127, 263 N. W. 553.

If petitioner is correct in his contention that the failure of respondent to actually exercise the control he had the right to exercise relieves the petitioner of his status as an employer, then any employer may escape his employer obligations by delegating control to subordinates and by allowing such subordinates to actually exercise control.

The evidence is uncontradicted that the interveners in the instant case desired to work for respondent only in the status of employees of respondent. It is likewise uncontradicted that they submitted themselves to the control of respondent over the performance of their services (R. 387, 626, 627). They did not refuse to follow any instructions issued by respondent (R. 382) and were willing to carry out any orders he might issue in the performance of their services (R. 383, 386, 626, 627). What more could interveners have done to have performed their services in the status of employees?

Could interveners perform their services for respondent as employees only on condition that they (1) required respondent to gather musicians together to form the orchestra; (2) rehearsed together only under the directions of respondent; (3) required respondent to personally arrange for the transportation of the musicians to his ballroom; (4) insisted that respondent furnish the instruments and music; (5) demanded that respondent arrange the seating of the orchestra on the bandstand; (6) played only when and what respondent actually directed them to play; (7) insisted that respondent pay the men directly and negotiate wages individually with each member of the orchestra; and (8) required respondent personally to handle and direct all of the other details and matters necessary for the formation and performance of musical entertainment?

That apparently is the contention of petitioner and that position we contend is utterly absurd and ridiculous. Why could petitioner not delegate the authority to the orchestra leader to perform these services on his behalf just as the Board of Directors of a corporation delegates authority to a general manager, and a general manager delegates authority to subordinates in the operation of a business? In fact practically all business enterprises are managed through the delegation of authority by the person or corporation having the ultimate right of control which he or it seldom if ever exercises directly and personally, often because the necessary skill to actually direct is lacking in the employer.

Interveners having submitted themselves to the control of petitioner in the performance of their services became the employees of petitioner whether or not he chose to exercise the control vested in him by the contract of hire. That is the decision of the Circuit Court in the instant case based on the uncontradicted evidence. There is, therefore, no conflict between that decision and the decisions cited by petitioner in his petition and brief.

The Remaining Issues Raised By Petitioner Are Not Substantial.

The remaining issues raised by petitioner in his Petition for Writs of Certiorari and Brief in Support Thereof are not substantial and are all subservient to the principal issue involved of whether petitioner had the right to control interveners in the performance of their services for petitioner.

The Circuit Court of Appeals Did Not Substitute Its Findings for Those of the District Court.

The Circuit Court of Appeals did not commit error and substitute its findings of fact for those of the District Court

as contended by petitioner. All the Circuit Court of Appeals did was to point out that the lower court had erred in refusing to recognize that the contracts of employment involved created in law an employer-employee relationship between petitioner and those whom he hired pursuant to those contracts (R. 691). The Circuit Court merely stated that reluctance to accept the disadvantageous features of a contract cannot relieve a person of his obligations under the contract (R. 692). The Circuit Court pointed out that the District Court's finding that there was no intent to vest control in petitioner, Bartels, was predicated upon Bartels' reluctance to accept the right of control and to assume the status of an employer. This reluctance on Bartels' part was, in the opinion of the Circuit Court, no basis for finding that the contract did not express the intent of the parties.

The Circuit Court stated that such a finding of a lack of intent to vest control in petitioner had to be supported by evidence showing by the action of the parties that their relationship of employer-employee had been abrogated. The Circuit Court found that there was no evidence in the record to that effect. In other words, the Circuit Court contended as a matter of law there was no credible evidence to sustain the Trial Court's findings and conclusions. This is far different from substituting findings of fact by the Circuit Court for those of the District Court. The court did not substitute its findings of fact for those of the District Court, but merely found error in the basis on which the District Court attempted to predicate its conclusions.

The Form B Contract was not Devised for the Purpose of Escaping Liability for Social Security and Employment Taxes.

Petitioner's contention that the contract of employment between the respondent and interveners was merely a device to escape the payment of social security and employment

taxes and that it was not accompanied by a change in the actual relationship of the parties is not tenable.

We do not desire to extend this brief and burden the court with a recital of the history leading up to the adoption of the Form B contract as a part of the constitution and by-laws of the American Federation of Musicians to show that the contract was not a mere tax evasion scheme.[3] Suffice it to say that the problem of clearly and unequivocally vesting control over the services of musicians in the person engaging those services was fully discussed by representatives of the American Federation of Musicians with officials of the Bureau of Internal Revenue which is charged with the enforcement of the taxing statutes. The Bureau of Internal Revenue concluded that the Form B contract did vest control in the person engaging the services of the members of orchestras and met the requirements of the Bureau of Internal Revenue (R. 511-517). (See Appendix A and B.) There is no allegation in the complaint of collusion between the American Federation of Musicians and the Bureau of Internal Revenue. Nor was there any. The conclusion of the Bureau of Internal Revenue was an honest conclusion, honestly reached. That governmental agency would never have reached such a conclusion had there been the slightest indication of tax evasion or fraud.

The Contracts Involved By Their Terms Vested The Right of Control in Petitioner.

The contention cannot be supported that the contract by its terms did not vest the petitioner with the right of control over the services of the orchestra on the unfounded theory that such contract incorporates the by-laws of the American Federation of Musicians within its terms and

[3]The history of the Form B contracts is brought out in the record, pages 500-624.

that such by-laws are inconsistent with the vesting of control in petitioner.

The facts are that the Form B contract was not only promulgated by President Petrillo under his powers and authority as contained in Article I, Section 1 of the constitution and by-laws of the American Federation of Musicians (R. 538) and approved by the Executive Board of the Union, but the American Federation of Musicians in convention adopted the Form B contract and it became a part of the constitution and by-laws of the American Federation of Musicians by such action of the Convention (R. 551-553) (See 1941 Constitution, p. 170, Article XVI (R. 545). Thus, any provisions of the American Federation of Musicians' constitution preceding that amendment to the constitution were automatically modified and must be interpreted to conform with the Form B contract. **American Jurisprudence**, Vol. 50, Sec. 340, p. 333; **McGraw v. Seigal**, 221 Iowa 127, 263, N. W. 553.

Further, in interpreting a contract its principal purpose must be given effect. **Williston**, Vol. 3, Sec. 619, p. 1781. Obviously, the principal purpose of the particular contracts involved in this case was to definitely and unequivocally vest in the respondent the full right of control over the services to be rendered in order that the persons performing for petitioner pursuant to the terms of that contract might occupy the status of employees.

The conclusive answer to petitioner's contention is that petitioner knew at the time he entered into the contract that pursuant to its terms he, petitioner, was vested with the right to control the musicians in the performance of their services for him and so understood the contract and the obligations it imposed on him (R. 109-110).

Conclusion

The opinion of the Circuit Court is entirely consistent with the established principles of law and with the decisions.

of all Federal courts which have come to our attention, including those cited by petitioner in his Petition for Writs of Certiorari and Brief in Support Thereof. If there is nothing in law which would prohibit interveners from performing their services as employees of petitioner rather than as independent contractors, they did perform their services as employees of petitioner for they insisted upon performing their services only as employees and petitioner agreed to that condition of employment. We respectfully submit that the Petition be denied.

Respectfully submitted,

JOSEPH A. PADWAY,
CHAUNCEY A. WEAVER,
ROBERT A. WILSON,
Attorneys for Interveners-Respondents.

"APPENDIX A"

A&C:RR:3

April 12, 1941.

Stevens Hotel Corporation,
Michigan Boulevard at Balbo Drive,
Chicago, Illinois.

Attention: Mr. J. A. Jones,
Resident Manager.

SIRS:

Reference is made to your letter dated March 19, 1941, in which you submit certain information requested by this office in connection with a determination of the status, for purposes of the taxes imposed by Subchapter A and C of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of Mr. Ray Heatherton and the musicians performing services under his direction at your establishment pursuant to a contract dated January 28, 1941.

You express the opinion in your letter that the legal relationship of employer and employee does not exist between the Stevens Hotel Corporation and Mr. Heatherton and the members of his orchestra. It is contended by you that Mr. Heatherton is an independent contractor, and your reasons for so believing are set forth.

Consideration has been given to the reasons set forth in your letter. However, it is noted that under the terms of the contract pursuant to which the orchestra is performing services, the Corporation engaged the personal services of eight musicians and a girl vocalist under the leadership of Mr. Heatherton. The contract specifies the place where the engagement is to be performed, the dates of the engagement, and the lump-sum weekly payment for the services of the orchestra. It is expressly stated in the contract that the Corporation shall have complete control of the services to be rendered thereunder. It is also provided that Mr. Heatherton as leader shall distribute the amount received from the Corporation to the musicians in accordance with the list appearing on the reverse side of the contract. Such list shows the names of the members of the orchestra, their social security account numbers, and their individual compensation. The contract is signed by a representative of the Corporation and by an employee of the Music Corporation of America, a booking agency, for Mr. Heatherton.

In view of the express terms of the contract it is clear that the Corporation has the right to exercise over Mr. Heatherton and the other members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the

relationship of employer and employee. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, held that Mr. Heatherton and the other members of the orchestra are employees of the Stevens Hotel Corporation for purposes of the taxes in question.

Respectfully,

(Signed) GUY T. HELVERING,
Commissioner.

cc: Collector,
Chicago, Illinois.

JPD:NCA

"APPENDIX B"

RAINBOW RANDEVU BALLROOM

A&C:RR:3-SAH

Oct. 18, 1944.

Collector of Internal Revenue,
Post Office Box 1288,
Salt Lake City 10, Utah.

Attention: EmT:FBM.

Reference is made to your letter dated October 9, 1944, and enclosures, relative to the Federal employment tax status of Mr. Les Brown and Mr. Jan Garber and the members of their orchestras with respect to services performed for Mr. Jerry Jones, doing business as the Rainbow Randevu Ballroom, Salt Lake City, Utah, pursuant to the terms of "Form B" contracts dated December 27, 1943, and July 21, 1943, respectively, copies of which were furnished.

Mr. Jones contends that the leaders and members of their orchestras mentioned above were not his employees irrespective of the form of contract under which they were engaged and refers to the ruling made in office letter dated November 20, 1942. Such ruling holds that Mr. Sonny Dunham and the members of his orchestra were not employees of Mr. Jones with respect to services performed by them pursuant to the terms of a contract dated August 14, 1940, on a contract form of the William Morris Agency, Inc.

The status of leaders and the members of their orchestras depends to a large extent on the terms of the contracts under which their services were performed. The contract under which Mr. Dunham and the members of his orchestra performed their services is similar in terms to that which was considered in Williams v. United States, 126 Fed. (2d) 129 C. C. A. 7, 1942. The Bureau has decided to follow the decision reached in that case in determining the status of orchestra members who perform services under contracts and circumstances and conditions which do not differ in any material respect from the cited case.

The terms of the contract commonly referred to as Form B, the form of contract adopted by the American Federation of Musicians for use in connection with engagement of musicians on and after June 1, 1941, provide for the employment of a certain number of musicians, including the leader, designated as employees, to render personal services for the purchaser, the employer; that the employer shall, at all times, have complete control over the services which the employee will render under the specifications of the contract; and that on behalf of the employer

the leader will distribute the amounts received from the employer to the employees, including the leaders.

The extended consideration which has been given to the terms of the "Form B" contract, and the circumstances and conditions under which the leaders and members of their orchestras perform services thereunder, has led to the conclusion that the purchaser of the music has the right to exercise over the leader and the members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee between the parties. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, the ruling of the Bureau that leaders and members of the orchestras who perform services under this form of contract are employees of the purchasers for Federal employment tax purposes. Your attention is invited to paragraph two of A&C:IT-Mimeograph Coll. No. 5638.

(Signed) VICTOR H. SELF,
Acting Deputy Commissioner.

SAH:JMC

Nos. 731 and 732

In the Supreme Court of the United States

OCTOBER TERM, 1946

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, AND GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER, AND PAUL MOORHEAD, INTERVENERS

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS, PETITIONERS

v.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 731

ROY BARTELS, ED. BARTELS, CARL BARTELS AND JUSTIN CONLON, D/B/A CRYSTAL BALLROOM, PETITIONERS

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 654–664) is reported in 59 F. Supp. 84. The opinion of the

Circuit Court of Appeals (R. 682–708) is reported in 157 F. (2d) 305.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on September 25, 1946 (R. 709–711). The petition for writs of certiorari was filed on November 29, 1946, and granted on January 6, 1947 (R. 714). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether musicians and their leaders who performed at the petitioners' ballrooms were employees of the petitioners within the meaning of Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, which define employment for social security tax purposes.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in the Appendix, *infra*, pp. 23–25.

STATEMENT

These actions were brought in the United States District Court for the Southern District of Iowa by petitioners for recovery of social security taxes with respect to the services of eleven orchestras which furnished music for public dances held at petitioners' ballrooms during the year 1940, 1941 and 1942. The cases were consolidated for

trial in the District Court (R. 654) and for hearing in the Circuit Court of Appeals for the Eighth Circuit (R. 675).

The orchestras were known as "name bands" which traveled together as a group and performed at hotels, college proms, ballrooms and over the radio (R. 71, 162–163, 259). Each orchestra functioned under a leader, who formed the group and attempted to develop a reputation which was based upon a distinctive style of play and on showmanship (R. 131–132, 162–163). The bands were advertised under the name of the leader as, for example, "Griff Williams and His Orchestra" (R. 260, 404–433). The leaders rehearsed the music, directed the seating arrangements, commenced and regulated the flow of music by means of a baton or other suitable signal, arranged instrumentations, and supervised the quality of music as it was being played (R. 55–56, 58, 272–275). Booking agencies were used to solicit engagements for the orchestras (R. 52). The engagements involved in this action were either for one night or at most for several intermittent nights (R. 50–51). The musicians furnished their own uniforms and instruments except the piano which the petitioners supplied (R. 54–55).

The leader hired and fired the other musicians (known as "sidemen") and determined their compensation, which was never less, but might be more, than the Union scale (R. 136, 258). The

leader paid the sidemen out of the sum received for the engagement from the petitioners and other ballroom operators. The leaders also paid transportation, agents' commissions, and other expenses out of this sum. (R. 135–136, 167–168.) Any excess remaining was retained by the leader as profit; if there was a deficit the loss was borne by the leader (R. 137–138, 168).

The ballroom owner (hereinafter referred to as "owner") would provide the place for the performance. The time was specified in the contract. (R. 141, 145, 177, 267, 307, 311.) There was evidence, which was disputed, that the owner would on occasion suggest that certain types of music be played, and that he specified the time of the intermission (R. 625, 315, 320).

On such facts the Commissioner of Internal Revenue had ruled and the courts had held, that the leaders were the employers. *Williams* v. *United States*, 126 F. (2d) 129 (C. C. A. 7), certiorari denied, 317 U. S. 655; cf. *Spillson* v. *Smith*, 147 F. (2d) 727 (C. C. A. 7). While this litigation was going on, the American Federation of Musicians undertook to devise a contract which would make the owners the employers of the musicians, in order to assure that the owners would be treated as employers for Social Security purposes. The contract adopted, known as the "Form B" contract, reads as follows (R. 12–14, 83, 141, 307, 311):

This Contract for the personal services of musicians, made this 26th day of July, 1941 between the undersigned employer (hereinafter called the employer) and 13 musicians (including leader) (hereinafter called employees) represented by the undersigned representative.

Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams, according to the following terms and conditions:

Place of employment: Crystal Ballroom, Dubuque, Iowa.

Date(s) of employment: September 1, 1941.

Hours of employment: 9 P M to 1 A M.

Price agreed upon: $350 Guarantee with A 60% Privilege Of Gross Receipts (Terms and Amount). (Rec'd $125.00 7/31 M. E.)

To be paid $125 Deposit, Balance by 11 P M Night Of Engagement (Specify when payments are to be made).

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied

to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction

the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer: Crystal Ballroom
By Roy Bartels
Street Address: 1545 Auburn St.
City or State: Dubuque, Iowa
Phone ----------

Accepted by Employer Roy Bartels
Accepted ----------
(Orchestra leader)

By (S) JAMES BREYLEY,
MUSIC CORPORATION
OF AMERICA,
Representatives of Employees.

Form B

734086—47——2

On April 12, 1941, the Commissioner of Internal Revenue advised an orchestra (R. 511–513) that:

> In view of the express terms of the contract it is clear that the Corporation has the right to exercise over Mr. Heatherton and the other members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, held that Mr. Heatherton and the other members of the orchestra are employees of the Stevens Hotel Corporation for purposes of the taxes in question.

On May 1, 1941, James C. Petrillo, President of the American Federation of Musicians, ordered all members of the Federation to use only the "Form B" contract (R. 14–15, 587).[1] The contract has been used in all engagements through-

[1] The contract provided that "all the rules, laws and regulations of the American Federation of Musicians * * * are made part of this contract" (R. 13). Many of these laws clearly indicated that the members were to be employed only by leader-members, and not by outsiders. See references in petitioners' brief, pp. 75–76. The Constitution of the Federation also provided that the President may by order "annul and set aside" "the Constitution, By-Laws", etc., "and substitute therefor other and different provisions of his own making" (R. 608). The Federation construed the President's order of May 1, 1941, as superseding all prior inconsistent provisions of the By-Laws or Constitution. But even apart from this, on ordinary principles of contract interpretation, assuming that the "Form B" contract and the

out the country since that time. Petitioners objected to entering into contracts in this form, but did so because they could not otherwise obtain any bands to play in their establishments (R. 109–111, 663).

The subsequently established record in these cases showed that in actual practice the business was conducted no differently than it had been before the advent of the "Form B" contract (R. 663, 139, 253, 277, 327, 365, 393, 397), although there was testimony that the leaders would have obeyed requests from the owners if any had been made (R. 393, 386–7, 558–9, 626–7).

The District Court found that the contract did not represent the true relationship of the parties; that it was not entered into by fair negotiations; and that the right of control as well as the actual control was intended to be retained and was retained by the leaders (R. 662–663). The court stated in its opinion that the orchestras, as independent organizations for hire, were inherently incapable of being controlled by the petitioners (R. 662). Accordingly, the court concluded that the leaders were independent contractors and that they, rather than the ballroom owners, were the employers of the musicians or sidemen (R. 665). The Circuit Court of Appeals reversed the judg-

By-Laws of the Federation should be treated as inconsistent provisions of the same contract, it would appear that the later and more specific provision of the Form would be controlling.

ments and remanded the cases to the District Court (R. 709–711).

SUMMARY OF ARGUMENT

As against the Government we do not believe that a contract reciting that a particular person is the employer and giving him the right of control is binding as a matter of law so as to preclude consideration of other factors. It is important that skill in the draftsmanship of legal papers bearing little or no relationship to the actual management of the affairs which they purport to describe should not allow parties to circumvent legislative enactments.

In these cases, however, the petitioners entered into these contracts with their eyes open, albeit unwillingly, and they are not in a position to insist that the Treasury disregard the contracts into which they have entered. Although the Government has the right to look through the form of a contract or other document to the substance of an arrangement, the parties who have voluntarily entered into the arrangement cannot *require* the Government to do so.

ARGUMENT

The Government is more concerned in this case with the establishment of correct principles of law than with whether the sidemen are employees of the ballroom owners or the leaders. In either event the sidemen are accorded Social Security protection.

A. THE PROBLEM IN RELATION TO ACCOMPLISHMENT OF THE PURPOSES OF THE STATUTE

In the brief for the United States in *United States* v. *Silk*, No. 312, the Government has argued that in determining whether persons are employees it is important that the purpose of the statute to give Social Security protection to those who are in need of it should be a guiding principle. This may also be true with respect to the determination as to which of several persons is an employer of workers who are undoubtedly employees of someone. Workers may be deprived of effective Social Security protection, or the Government of the funds upon which the Social Security system rests, if a factory or mine operator, for example, is permitted to establish a plan whereby the work is technically contracted out to workmen, or some of them, as nominal independent contractors. In such cases workers or the Treasury might be deprived of their rights under the Act, both because the subdivision of the employment might result in units smaller than the eight-man minimum subject to the Unemployment Compensation portion of the Social Security scheme, and because the Treasury would have to look to workers who normally keep inadequate records and have few financial resources, rather than to the financially responsible management, for its revenues. In such situations the skill of lawyers in drafting an air-tight contract trans-

ferring—at least on paper—the control and other features of the employment relationship to supervisory or other workers should not enable the true employer to circumvent the statutory purpose. E. g., *Walling* v. *Rutherford Food Corp.*, 156 F. (2d) 513 (C. C. A. 10), pending on writ of certiorari, No. 562.

In the instant cases we do not get much help by referring to the basic statutory objectives. For whoever is the employer—and certainly despite the contention to the contrary in *Nebraska National Hotel Co.* v. *O'Malley*, No. 941, certiorari denied March 3, 1947, either the leader or the owner is the employer—the sidemen are accorded Social Security protection. And it is the sidemen, rather than the leaders of these name bands, who are dependent on another's business enterprise for their livelihood and work. Nor can it be said that the Treasury has any particular choice as between the leaders or the owners insofar as tax collection is concerned; each is normally sufficiently responsible. Even though this may not always be the case as to particular individuals, it can not be assumed that this is more true of one group than the other.

The substantive differences insofar as coverage is concerned are that: (1) The leader is covered if the owner is the employer; and (2) a band may be exempt from unemployment compensation coverage if the number of employees would be less than eight if the leader is excluded, and if the

musicians plus other employees of the owner would total more than eight.[2] Although these matters will be of importance to individuals, the Government does not believe that they are entitled to much, if any, weight in determining who should be treated as the employer. For, apart from the contract to be considered, the leaders of the name bands in the cases before the court certainly have the normal attributes of the entrepreneur, and the circumstance that particular bands may include less than eight members does not in this industry manifest an attempt to establish a formal but artificial employer relationship.

It may be observed that such musicians may not be typical of musicians generally. Bands led by a musician of prominence playing short stands in different establishments are much more likely to be independent of the owner of the establishment, from the viewpoint both of economic and physical control and integration in his business, than bands attached to the establishment for a considerable period of time or in which the leader has no real independent organization of his own. Bands of the latter type should probably be treated as employees of the owner of the establishment irrespective of the decision in these cases.

[2] It is also true that particular engagements for exempt charitable, educational, or governmental organizations will not be covered if the owner rather than the leader is the employer. This factor, however, is not of great significance.

In the absence of guidance from the statutory objectives, we turn to the criteria by which the employment relationship is customarily tested.

B. THE CONTRACT IS NOT CONCLUSIVE UPON THE GOVERNMENT

At common law the same factors are customarily referred to in determining the identity of the employer as in determining whether any employment relationship exists at all. See Restatement of Agency, Section 220. The factor most stressed and sometimes regarded as basic, with the others only evidentiary, is the right to control the employee's work.

Insofar as name band musicians are concerned, before the establishment of the Form B contract the Commissioner had ruled and the court held in the *Griff Williams* case, *supra*, that the sidemen were subject to the control of the leaders and that the leaders were the employers. (See p. 4, *supra*.) The court below, while accepting those decisions, thought that the Form B contract shifted the right of control to the owners and in and of itself made them the employers. It is also suggested that in any event the Commissioner was not required to look through the contract at the instance of one of the parties to it. As will appear we are in accord with the second suggestion but not as to the court's view of the conclusive nature of the contract.

The Form B contract describes the ballroom owner as the employer and all musicians and leaders as his employees. The court below did not, however, rely on these recitals as to status but on the provision that "the employer shall at all times have complete control of the services which the employees will render under the specifications of this contract." This provision, the court held, gave the owner the right to control the musicians' services whether he exercised it or not, and that unless the contract was abrogated or modified by subsequent conduct manifesting an inconsistent intention, this made the owner the employer.

We agree that significance attaches to the right of control and not merely to control actually exercised. But we do not regard that factor as all-conclusive when other factors point toward a different employer, particularly when it appears that actual control is in almost every important respect exercised by someone else.

If we assume, however, that the right to control alone need be considered and that the contract gives that right to the owner, we still would not treat the contract as decisive when evidence as to conduct shows that in fact the contract does not conform to the relationship actually existing. In this field, as in others, it is important that parties not evade their obligations by the use of legal documents which on their face do, but in fact do not, change the substance of a relationship.

Cf. *Commissioner* v. *Tower*, 327 U. S. 280; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331; *Helvering* v. *Clifford*, 309 U. S. 331; *Gregory* v. *Helvering*, 293 U. S. 465.

As between the parties it may be true as a matter of contract law that the contractual provision is binding unless abrogated by mutual understanding. The test is not the same for an outsider like the Government. Even if the parties intend not to abrogate the contract, the Government is not bound by it if it does not describe the actual relationship. That is not to say that the contract is immaterial, that it is not an important factor in determining employment. We contend only that it is not in and of itself decisive when all other evidence points in a contrary direction.

As we have pointed out, the court below conceded this to be true as to recitals in a contract, but not as to promises or covenants, which in themselves establish obligations. The court's view was that if the parties agree that one of them has the right to control the other, he has it, and that since this is a matter upon which they can agree, nothing more need be considered. We agree that as between the parties the covenant may be binding, and that a covenant is entitled to more respect than a mere recital of status. But to attribute absolute binding force to such covenants would still permit the circumvention of legislative enactments through mere skill in

drafting legal papers which bear little or no relationship to the actual management of the affairs they purport to describe. If attorneys were advised that although declaratory or descriptive recitals were insufficient, agreements that a particular person had or had not the right of control would avail, they would find little difficulty in adapting their writings to the latter rule.

It is, of course, simpler to refute a covenant denying the right to control than one granting it. For the actual exercise of control by the person to whom it is denied by the contract would show that he had control in fact. The failure to exercise control by one granted the right by contract does not prove that he does not have it. A latent power to control may in itself be sufficient to subject a worker to an employer's dominance. Nevertheless, we think that circumstances may refute a contractual grant of control if it is shown that in fact not only is actual control exercised by another but that the nature of the enterprise is such as to make it reasonably plain that everyone knows that it must be.

C. THE GOVERNMENT IS ENTITLED TO RELY ON THE CONTRACT

Our conclusion is that when a contractual provision such as is here involved is inconsistent with the parties' conduct, the Government is not bound by it when it is used as a means of evading a statutory obligation.

But in these cases the situation is peculiar. The device here employed does not decrease the revenues. It was intended not to escape or reduce taxes but to transfer the liability in a manner which would normally increase the tax payment and expand the statutory coverage (through the inclusion of the leader and bands smaller than eight in number). The contract may be regarded as no more than a lawful transfer of the tax, binding as between private parties without harming the Government in any way.

The contract was entered into by the parties, including the petitioners, with full knowledge of its provisions. Months before the engagements involved in these cases the Commissioner had ruled that the Form B contract on its face made the ballroom owner liable for Social Security taxes (R. 511, *supra*, p. 8). The American Federation of Musicians had given wide publicity to this ruling, and had made no secret of the fact that the purpose of the contract was to make the owners the employers for Social Security purposes (R. 583–585). Although the petitioners signed these contracts unwillingly, they did so with their eyes open. There was no more duress than in the case of an employee who must accept a particular job in order to support his family; his need does not make the contract illegal. The same must be true

when the employer has the inferior bargaining position.[3]

The owners would thus not seem to be in a position to insist that the Treasury disregard the contracts into which they have entered.

In a situation of this sort, as the court below stated (R. 695): "The right to make the choice * * * is the Commissioner's." This Court has held on several occasions that although "the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him," a "taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages." *Higgins* v. *Smith*, 308 U. S. 473, 477. In *Moline Properties, Inc.* v. *Commissioner*, 319 U. S. 436, 439, the Court cited approvingly *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, as holding that "the choice of the advantages of incorporation to do business * * * required the acceptance of the tax disadvantages." See also to the same effect, *Schenley Corp.* v. *United*

[3] In *Moline Properties* v. *Commissioner*, 319 U. S. 436, 440, the Court stated "The argument is made by petitioner that the force of the rule requiring its separate treatment is avoided by the fact that Thompson was coerced into created petitioner and was completely subservient to the creditors. But this merely serves to emphasize petitioner's separate existence."

States, 326 U. S. 432, 437; *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590; *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456; *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435.[4]

The rule that the Government is not compelled to look through an arrangement into which the parties have entered is not limited to cases involving corporate entities. In *Gray* v. *Powell*, 314 U. S. 402, the Court said with reference to an independent contractor relationship (p. 414):

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[4] *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, relied upon by petitioners, was concerned with whether a certain payment to a liquidating corporation was consideration for its assets or money furnished by the corporation's individual owners to pay its expenses. Certain documents recited that it was consideration; others indicated that it was not, and the latter were supported by the oral testimony. It was in this connection that the Court, in refusing to be bound by the statements in the former documents, made the remarks quoted by respondent. The prefacing sentence to the statement of the circuit court of appeals in that case (quoted in this Court's opinion, 300 U. S. at 492–493) that "taxing authorities must look through form to fact and substance" was that "a consideration of all the documentary evidence drives us to the conclusion that the $350,000 was not consideration." The opinions do not suggest that the documents supporting the position that the payment was made as consideration were entitled to greater respect than the others. The case thus does not involve the effect to be given a single contract uncontradicted by other documents, which on its face bears a definite meaning. The rule of the cases cited in the text that parties to such contracts cannot force the Government to treat them as sham would obviously not preclude courts from interpreting a confusing group of inconsistent papers such as was involved in the *Tex-Penn* case. The *Tex-Penn* case thus does not deal with the problem we have here, and is not inconsistent with the other authorities.

"The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan. *Higgins* v. *Smith*, 308 U. S. 473, 477." In *Helvering* v. *Coleman-Gilbert Associates*, 296 U. S. 369, 374, the Court stated with respect to a trust: "The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted."

We are not, of course, contending for any general right of the Government to choose between possible taxpayers irrespective of circumstances. Our suggestion is limited to the situation in which a person knowingly and for his own reasons enters into a contractual arrangement which will subject him to taxation or regulation. When he does that he should not be able to require the Government to disregard the obligation he has undertaken.

The reasons why the Treasury has ruled that the Form B contract is controlling are not difficult to perceive. The Treasury regulation on this subject has long stressed the right of control. See pp. 23–25, *infra*. Here the contract expressly vested that right in the owner. The Treasury ruling was based on the contract. The ruling on its face shows that it rests only on the facts submitted to the Treasury. The Treasury did not have before it facts showing, and was not required to assume, that the changed status established in the contract would not be reflected in actual operations.

As we have indicated, *supra*, pp. 10–13, the Treasury's interest in which of the two potential employers here pays the taxes is not vital. The primary advantage to the Treasury in relying on the contract is its definiteness. If the Treasury can stand on the contract, which is presently employed by all musicians throughout the country, it avoids the necessity of having to litigate each of the manifold fact situations which will otherwise inevitably be presented, depending upon how much control the ballroom or hotel or club owner actually exercises. There is thus an advantage to the Commissioner in not being *required* to look through the general contract to the facts of each case in order to decide whether the contract fully describes the relationship. We submit that the petitioners cannot force him to do so, and that, for this reason, the judgment below should be affirmed.

Respectfully submitted.

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MARCH 1947.

APPENDIX

Internal Revenue Code:

> SEC. 1426 [as amended by Section 606 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. DEFINITIONS.
>
> * * * * *
>
> (b) *Employment.*—The term "employment" means * * * any service, of whatever nature, performed * * * by an employee for the person employing him. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 1426.)

The definition of employment in Section 1607 (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939 is identical.

Treasury Regulations 106, pertaining to the Federal Insurance Contributions Act:

> SEC. 402.204. *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done.

In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act * * *.

Treasury Regulations 107, Section 403.204, pertaining to the Federal Unemployment Tax Act, are identical.

U. S. GOVERNMENT PRINTING OFFICE: 1967

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 731

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON D B A CRYSTAL BALLROOM,

Petitioners,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

Respondent,

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD,

Interveners, Respondents.

No. 732

LARRY V. GEER AND MARGARET GEER, D B A LARRY GEER BALLROOMS,

Petitioners,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

Respondent

BRIEF OF INTERVENERS, RESPONDENTS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 731

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON D/B/A CRYSTAL BALLROOM,

Petitioners,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

Respondent,

AND

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD,

Interveners, Respondents

No. 732

LARRY V. GEER AND MARGARET GEER, D/B/A LARRY GEER BALLROOMS,

Petitioners,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

Respondent

BRIEF OF INTERVENERS, RESPONDENTS

THE OPINION BELOW

The opinion of the District Court (R. 654-664) is reported in 59 F. Supp. 84. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 682-709) is reported in 157 F. 2d 295.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered September 25, 1946 (R. 709-711). The petition for writs of certiorari was filed on the 29th day of November, 1946 and was granted January 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C., Sec. 347 (a).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Section 1426 (b) and 1607 (c) of the Internal Revenue Code, together with the regulations issued thereunder, are set forth in Appendix A, *infra* pg. 66.

STATEMENT OF THE CASE

Interveners Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, the six orchestra leaders named in the complaint, filed by the petitioner in the case of *Bartels, et al.* v. *Birmingham, Collector* (R. 2, 4), severally petitioned and were granted leave to intervene in that proceedings (R. 20-36). The basis for the intervention of Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead was that the employment status of each of these interveners in his individual employment relationship with petitioner Bartels, *et al.*, was put in issue in this case and concededly if petitioner should prevail interveners would each be liable for a portion of the taxes paid by petitioner on the particular engagements involved (R. 20, 22, 25, 27, 30, 33).[1]

The petitioner brought this action to recover $20.98 paid by him under the Social Security Act (Section 1426, Inter-

[1] While the case of *Bartels, et al.*, v. *Collector of Internal Revenue* was consolidated for trial with the case of *Geer, et al.* v. *Collector*, interveners are interested only in their individual cases. This brief, therefore, is concerned only with the employment status of interveners in their respective relationships with petitioner Bartels, *et al.*

nal Revenue Code as amended by Sec. 606 of Social Security Act Amendments of 1939, Chapter 666 (53 Stat. 1360; 26 U. S. C. 1426) on the wages of musicians, members of dance orchestras engaged by petitioner in the furtherance of his business. The basis of the action was that the leaders of the musicians engaged by petitioner were the employers of the musicians rather than petitioner, and that petitioner, therefore, was assessed wrongfully for these taxes by the Collector of Internal Revenue (R. 1-18).

The material facts of the case simply stated are as follows: Petitioner operates a ballroom in which dances are given for the public (R. 50). Persons are charged an admission fee to attend these dances, and as an integral part of this business, petitioner engages musicians to furnish dance music and entertainment for the patrons of the ballroom (R. 50-51). The musicians who were hired by petitioner for the musical engagements involved herein, were members of organized orchestras under the direction of leaders and the orchestras were identified by the names of the various leaders (R. 51). All of the members of the orchestras involved in this case, including the leaders, were members of the American Federation of Musicians, a labor organization composed of musicians (R. 653).

In June of 1941, the American Federation of Musicians adopted and incorporated in its by-laws a form of contract known as the Form B contract, and all members of the American Federation of Musicians were ordered by the President of the American Federation of Musicians to play all engagements entered into after June of 1941 pursuant to the terms and conditions of the Form B contract and none other (R. 500-504). (Full contract set forth on R. 87-89).

A Form B contract was entered into by petitioner for each engagement of a dance orchestra involved in this case (R. 83, 87, 91, 93, 95, 401).

The Form B contracts entered into by petitioner for the services of the musicians provided, among other things, that the petitioner hire the musicians in the orchestra severally; that the petitioner was to be the employer of the musicians; and that the petitioner was to have the full right of control of the musicians in the performance of their services for the petitioner.

SUMMARY OF ARGUMENT

I. The basic question in this case is whether interveners could contract to perform their services as the employees of petitioner or whether they, against their will, were required by law to perform their services only as independent contractors.

Petitioner desired to employ the interveners in the furtherance of his business. Interveners advised petitioner that they would work for him only if he would agree to employ them as his employees and only if he would assume the right of control over their work. In order that there could be no mistake concerning their intentions to work only as employees, interveners required that the contract of hire expressly spell out an employer-employee relationship and expressly vest in petitioner the right of control over the services to be performed. Petitioner, in order to obtain the services of interveners, entered into this employment contract and expressly agreed to assume the status of an employer and to accept the right of control over interveners' services.

The District Court held that this contract of employment, expressly spelling out an employer-employee relationship and expressly vesting the right of control in the petitioner, did not create an employer-employee relationship and disregarded the contract in determining the relationship of the parties on the ground that petitioner did not actually exer-

cise control over interveners and because of certain other extrinsic factors concerning the manner in which the orchestras had been formed and were operated. This was the equivalent of saying that interveners could not, as a matter of law, create an employer-employee relationship so long as petitioner would not actually exercise control over the work and so long as the orchestras remained organized groups and did not change their manner of operations.

The Circuit Court of Appeals, without substituting findings of fact for those of the District Court, held that the interveners and petitioner could and did establish employer-employee relationships by their express contracts and in the absence of evidence showing an abrogation of those contracts, or an implied substitution of different contracts by acts and conduct inconsistent with the relationship established therein, the contracts must be held conclusive in determining the status of the parties. None of the evidence in the record tended to establish any conduct inconsistent with the employer-employee relationship which the parties had created by their contracts of hire and, therefore, under the terms of these contracts the employer-employee relationships existed.

The error in the District Court's reasoning that the contracts of hire could and should be disregarded in determining the status of the parties is immediately apparent if we would assume, for the purpose of illustration, that the *petitioner* had been the party requiring that the work be performed under his direction and control. The same contract could be used, the same facts could exist. Petitioner certainly could not then contend he was not the employer as he is doing in the instant case. Yet, the only distinction between that case and the instant case would be that the *petitioner* required the services to be performed under an employer-employee relationship rather than interveners.

Thus the contracts of employment involved in the instant case must be held to have created the intended relationship in the absence of evidence establishing an abandonment of the contracts. If this were not so, an employer expressly retaining to himself the right to control others in the performance of work could escape his employer liabilities in each instance in which it was not necessary for him to actually exercise the control he retained for himself in his contract of employment.

II. This Court has held that common law concepts are not applicable in determining employer liabilities and responsibilities under statutes concerned with employment relations, but that employment status should be determined in the light of the purpose of the statute.

The purpose of the Social Security Act is to provide for unemployment compensation and old age assistance for those who in some way promote the business of others in the performance of their services.

Intervenors performed services for petitioner in the furtherance of petitioner's business. Petitioner sought business profits through the services of interveners whom he engaged. He, therefore, should be liable for the employer social security tax on the compensation paid to intervenors and the other members of the orchestras hired by petitioner in his business.

ARGUMENT

I. The History of the Form B Contract

The issue in this case, insofar as interveners-respondents are concerned, goes far beyond and far deeper than the question of liability for the $20.98 prayed for by petitioner in his complaint. The real issue to interveners, at least,

is whether they, in the performance of their work of leading orchestras, can render their services as employees of those who would engage them, or whether they are bound in law to accept employment only in the status of independent contractors.

As employees, leaders would be entitled to the benefits of old age insurance, unemployment compensation and to the benefits provided under the workmen's compensation laws of the various states, as well as all of the other highly desirable benefits and protections provided in law for employees. As independent contractors, not only would they lose these benefits, but in many instances the sidemen[2] in the orchestras they lead would not enjoy these benefits because of an insufficient number to meet the requirements of the various laws. For example, many state laws do not extend unemployment compensation coverage in instances where eight or fewer employees are involved, and in many states workmen's compensation does not extend to small groups of employees. Therefore sidemen in small orchestras would lose benefits in many instances if they are the employees of the leaders, while as employees of the person engaging the orchestra, they, together with the leader would be merged in with the other employees of that person in computing the number of employees.

While the enactment of the Social Security Act gave added importance to the question of the relationship of an orchestra leader and members of an orchestra to the person or establishment engaging the orchestra, many cases involving this question arose prior to the enactment of the Social Security Act, with the musicians, including the

[2] Sidemen is a term which designates the instrumentalists in an orchestra as distinguished from the leader.

leaders, contending successfully that they were employees of the persons engaging the services of the orchestras.[3]

When the Social Security Act became law, professional musicians[4] throughout the country, in order to obtain the full benefits of that law, took the position through their labor union, the American Federation of Musicians, that they were employees of those engaging their services, were entitled to the benefits of the Act and were liable for the employees' share of taxes or contributions. At that time the Bureau of Internal Revenue issued a ruling supporting

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[3] In the following cases the purchaser of the music was held to have been the employer of the musicians, including the leader, he had engaged in the furtherance of his business:

Cases involving claims for Workmen's Compensation:

Rossini v. *Tone*, 7 Conn. Supp. 13;
Boyle v. *Mahoney*, 92 Conn. 404, 103 Atl. 127;
Europe v. *Addison Amusements, Inc.*, 231 N. Y. 105, 131 N. E. 750.

Bankruptcy claims in which musicians were held to have a prior claim on basis claim was for wages due which had been earned in furtherance of bankrupt's business:

In re Caldwell, 164 F. 515.

Maritime Lien—Musicians held employees of vessel:

The Sea Lark, 14 F. (2d) 201 (1926)

Copyright Infringement—Hotel held to have employed musicians in furtherance of business of operating hotel:

Herbert v. *Shanley Co.*, 242 U. S. 591, 37 S. Ct. 323, 61 L. Ed. 511.

Tort Case—Theater held liable for negligence of entertainers employed by theater to entertain patrons:

Rome Savings Bank, 96 Misc. Rep. 188, 161 N. Y. S. 15 (1915).

[4] We include orchestra leaders in the term "musicians" for they are no more than musicians performing a necessary work in the rendition of musical entertainment, and in many instances play as sidemen on many engagements and perform as leaders only when they can obtain employment as leaders. Leaders belong to the same labor union as the sidemen, the American Federation of Musicians, and there is no distinction in the class of membership between sidemen and leaders. Very few leaders have large incomes and financial security. The great majority, by far, have very nominal incomes and are as interested in and as much in need of the benefits of the Social Security Laws as any other class of workmen.

this position of the American Federation of Musicians. This ruling was as follows:

> "The musicians individually do not practice an independent profession in which they offer their individual services to the public generally as in the case of doctors, lawyers, and other like independent contractors This is clearly demonstrated by the fact that the musicians are bound together in a voluntary union which (1) fixes the amount of compensation they shall receive for their services; (2) requires that all musicians in a specific employment shall receive the same compensation, regardless of the particular skill or ability of the individual musician or the type of instrument played; and (3) insofar as possible otherwise prescribes and regulates the conditions under which their services may be performed. These are not the characteristics of independent contractors.
>
> "At most the musicians are no more than highly skilled employees. They are hired to perform personal services and are subject to control and direction on the part of their employers. True, the employers do not have unlimited control over the musicians, but must employ them in accordance with the rules and conditions prescribed by the union. However, the fact that the musicians are in substance thus enabled to require the employers to adhere to certain standards in respect to wages and other conditions of employment does not make them any the less employees. The employers have the right, within the limits prescribed by the union rules, to control and direct the musicians and may exercise their right in respect to such matters and to such extent as considered necessary. Accordingly, the Bureau is of the opinion that the musicians are employees for purposes of the taxes imposed under titles VIII and IX of the Social Security Act". (Opinion, March 13, 1937, No. HT:SS:R.)

At a later time the Bureau of Internal Revenue, upon a reconsideration of its position in regards to the status of sidemen and orchestra leaders came to the conclusion that

persons and establishments engaging orchestras had no right of control over the services of the musicians and that the right of control was in the leader. Thereupon the Bureau of Internal Revenue reversed its position and issued a ruling to the effect that orchestra leaders would be considered as independent contractors and the employers of the members in the orchestras they lead, because the right of control over the manner and method of the performance of the musicians, in the opinion of the Bureau of Internal Revenue, was vested in the leaders and not the persons engaging the services of the musicians.

After the Bureau of Internal Revenue had taken this position, Griff Williams,[5] an orchestra leader, was held by the Bureau of Internal Revenue to be liable for the employer's tax on the premise that those establishments which had engaged the orchestra had not had the right of control over the musicians. Griff Williams was assessed for the employer's tax. He paid the tax, then brought suit on May 15, 1940 to recover the amounts paid, contending that he and the other members of the orchestra had been employees of the establishments in which the orchestra had played. (*Williams* v. *United States*, 38 Fed. Sup. 536). This complaint was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 329). After making extensive findings of fact and conclusions of law, the District Court held that Griff Williams was an employee of the establishments in which the orchestra had played, that the tax had been improperly assessed against him and judgment was entered in his favor. The decision was issued on May 2, 1941 and is recorded in 38 Fed Sup. 536 (later reversed).

In the latter part of December 1940 and in January of 1941 (prior to the decision of the District Court in the

[5] This is the same Williams as the intervener, Williams.

Griff Williams case (*supra*)), the Executive Board of the American Federation of Musicians met and discussed thoroughly this question of the relationship of an orchestra leader to establishments engaging the services of an orchestra, to the end that orchestra leaders and musicians in general might receive to the fullest possible extent the benefits and rights provided for in the Social Security Laws (R. 500-503, 575-577, 623-624).

Conferences were held with the Bureau of Intrenal Revenue as to its existing rules and concerning the circumstances under which members of orchestras, including the leaders, would be employees of establishments engaging their services under the Social Security Laws (R. 500-503, 575). The Bureau of Internal Revenue advised the officials of the American Federation of Musicians that musicians, including leaders, would be employees of the establishments engaging the services of the musicians within the meaning of the Social Security Act, as administered by that Bureau, only if the establishments engaging the musicians and leaders had the right to control the services of the musician (R. 576-587). The International Union thereupon, through its president and pursuant to his powers and authority under Article I, Section 1, of the by-laws of the Union (R. 538), (Interveners' Ex. No. 7), adopted a rule, approved by the Executive Board of the Union, that establishments engaging the services of musicians should expressly have the full right of control over the services of the musicians, leaders and sidemen alike (R. 501-502).

In order that there might be no mistake with respect to the right of control being vested in the establishments, a specific form of contract was adopted by the American Federation of Musicians containing provisions embodying this policy and law of the Federation. Leaders and also booking agencies, engaged in the business of finding employ-

ment for orchestras, were commanded and directed to use that specific form of contract which had been adopted by the Union and none other (R. 14, 503). This contract, known as the Form B contract, was made an integral part of the constitution and by-laws of the Union and was approved by the Convention of the Union which was held in Seattle in June of 1941 (R. 551-553). (See Intervener's Exhibit No. 7 (R. 538); Article XVI, p. 170 of the 1941 Constitution of the American Federation of Musicians (R. 545)). Thus the policy and the rule embodying that policy became an amendment to the constitution and by-laws of the American Federation of Musicians, not only as a result of the action of the president under his powers contained in Article I, Section 1 of the by-laws, but also by the action of the Convention of the Union. Parenthetically, we remark that all of the contracts in issue in this case were entered into after the Convention in Seattle had amended the constitution and by-laws by adopting Article XVI, which is the contract.

After the conferences had been held with the Bureau of Internal Revenue concerning their existing rules and the Union had been advised under what circumstances leaders and musicians would be employees of establishments engaging their services, and after the Union had drafted the Form B contract, it directed one of its members, Ray Heatherton, to perform his services under the terms and conditions prescribed in the Form B contract (R. 507-508). This was done. Thereupon the Stevens Hotel of Chicago, Illinois which had employed Ray Heatherton and the orchestra he led under the terms of the Form B contract, submitted the contract of employment to the Bureau of Internal Revenue for an official ruling as to whether or not the leader of the orchestra and the members of the orchestra were employees of the hotel under the terms and conditions of this particular contract (R.

511). The Bureau of Internal Revenue in reply ruled to the effect that under the terms of the contract the *"RIGHT of control"* of the leader and the musicians was clearly vested in the establishment and that the establishment thereupon was liable for the employer's share of the social security tax (Intervener's Exhibit No. 1 (R. 508-513) (R. 511-517)).

(The ruling of the Bureau of Internal Revenue is set forth fully in Appendix B (*infra*) pg. 68, for the convenience of the Court.)

Nor was this the only occasion upon which the Bureau of Internal Revenue was called upon to decide the issue of whether musicians, including leaders, were employees of establishments engaging their services under the terms of and pursuant to the Form B contract.

In February of 1944 the Bureau reiterated its opinion that musicians performing services pursuant to the terms of the Form B contract were employees of the establishments engaging them and as late as November of 1944, the Bureau issued a bulletin to the same effect (Intervener's Exhibit No. 3 (R. 531, 534)). (Text of Intervener's Exhibit No. 3 set forth in Appendix C, *infra*, R. 70.)

On October 18, 1944, the Bureau of Internal Revenue sent a letter to its Collector of Internal Revenue at Salt Lake City, Utah in answer to a request made by the Collector as to the status of parties under the Form B contract. The Local Collector of Internal Revenue was advised in part as follows: (Intervener's Exhibit No. 2 (R. 518, 527)).

The extended consideration which has been given to the terms of the "Form B" contract, and the circumstances and conditions under which the leaders and members of their orchestras perform services thereunder, has led to the conclusion that the purchaser of the music has the right to exercise over the leader and the members of the orchestra

the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee between the parties. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, the ruling of the Bureau that leaders and members of the orchestras who perform services under this form of contract are employees of the purchaser for Federal employment tax purposes. Your attention is invited to paragraph two of A&C:IT-Mimeograph Coll. No. 5638.

(Full text of letter set forth in Appendix D, *infra*, pg. 72.)

The Form B contract thus was adopted to remove any doubts as to the location of the right of control over the services of musicians who were members of the American Federation of Musicians in the rendition of their services, and to definitely and finally settle the vexing question, even then pending before the courts (*Griff Williams* v. *United States*, 126 F. (2d) 129), of whose was the right of control over the members of orchestras while rendering their services. The Form B contract placed such right of control unequivocally in the person or establishment hiring the musicians. And the Bureau of Internal Revenue has held that the right of control over the services is in the person engaging the musicians under the terms and conditions of the Form B contract and such person is therefore the employer of the musicians and liable for employer taxes under the provisions of the Social Security Act.

II. Petitioner Was the Employer of Interveners and Members of the Orchestras Led by Interveners under Common Law Concepts.

While some Circuit Courts of Appeals have held that only those who can be considered as employers under the common law are liable for taxes under the Social Security

Act (*Texas Co.* v. *Higgins*, 118 F. (2d) 636; *Anglim* v. *Empire Star Mines Co.*, 129 F. (2d) 914,) others have held that the term "employment" as used in the Social Security Act should be given a more liberal interpretation in determining liability for social security taxes in order that the remedial purposes of the Act might be carried out to the fullest extent. (*United States* v. *Vogue*, 145 F. (2d) 609; *Grace* v. *Magruder*, 148 F. (2d) 679.)

This Court has not spoken directly on this issue but has indicated in decisions involving other statutes concerned with employer-employee relations, that it is erroneous to affix statutory liabilities and responsibilities against only those who would be deemed employers under the common law. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 645 S. Ct. 851; *United States* v. *American Trucking Association*, 310 U. S. 534, 84 L. Ed. 1345.

At a later point in this brief we shall present an argument to the Court that liability for employer taxes under the Act is not confined to only those employers who would be considered employers or masters under the common law and discuss the cases cited above; however, at this point in our brief we shall address ourselves to the argument that petitioner was the employer of the musicians he employed pursuant to the terms of the Form B contract under the common law conception of an employer or master.

A. A PERSON MAY REQUIRE AS A CONDITION OF EMPLOYMENT THAT HE OCCUPY THE STATUS OF AN EMPLOYEE OF THE ONE FOR WHOM HE IS TO RENDER SERVICES.

It is a basic and elementary rule of law that the relationship between one performing services for another and the one engaging those services is contractual. 35 *American Jurisprudence*, Sec. 8, page 450; 1 *Corpus Juris*, Sec. 1, page 33; *Younger* v. *Moore*, 135 S. W. (2d) 780; 18 *Ruling*

Case Law, Sec. 3, page 493; *Labatt*, "*Master and Servant*", Volume 1, Section 88, page 316.

Admittedly each employment relationship involved in this case was created and existed pursuant to expressed contracts known as Form B contracts (R. 83, 87, 91, 93, 95, 401). And admittedly the provisions of these contracts expressly and definitely spelled out an employer-employee relationship between petitioner and the musicians, including the leaders, petitioner hired on the occasions involved in this case (R. 120). The contracts provided that petitioner hired the musicians severally, was to be considered the employer of the musicians he hired and was to have the full right of control over the services the musicians were to render for him. That petitioner fully understood the implications of these provisions in the contracts prior to executing the contracts and that he understood that these provisions of the contract gave him the right to control the musicians in the rendition of their services and placed him in the status of an employer in his employment relationship with the musicians, is clear from his testimony, for he stated that he objected to employing the members of the orchestra severally (R. 109), he objected to being designated the employer (R. 109), he objected to having the full right of control over the members of the orchestra (R. 110) and he knew that the contract placed him in the status of an employer (R. 120). Although obviously he was reluctant to occupy the status of an employer in his employment relationship with the musicians he hired, petitioner entered into the Form B contracts expressly establishing the employer-employee relationship between himself and the musicians because that was the only condition under which the musicians would work for him (R. 53, 110-111).

Petitioner certainly then, under the most elementary, basic and fundamental rule of law, became the employer of the musicians he engaged because he contracted to hire them as his employees. Petitioner would not have become the employer of the musicians under the Form B contract only if there is in law some prohibition against a person contracting to serve in the capacity of an employee under some circumstances. This poses the fundamental question involved in this case, namely, *may a person require as a condition of employment that he occupy the status of an employee of the one for whom he is to perform services, or is a person required to perform work for another only in the capacity of an independent contractor even though he expressly refuses to work in any other capacity than that of an employee?*

We know of no law and we find no cases cited in the decision of the District Court nor in the brief of petitioner to the effect that there are limitations and restrictions on the type of relationship one may contract for in performing services for another, or that a person offering his services to another must, against his will, contract to serve in the capacity of an independent contractor and not that of an employee.

It would seem indisputable that a person is free to contract to perform services for another in either the capacity of an independent contractor or as an employee. If a person is willing to sacrifice the right to control the method and the manner and the means by which his work is to be performed, he certainly, under law, should be able to become an employee of the person desiring his services to the same degree that a person may insist on working only as an independent contractor, free from control of others in the performance of his work. This Court in the case of *Standard Oil Company* v. *Anderson*, 212 U. S. 215, 29 S. Ct. 252,

53 L. Ed. 480, recognized this right of parties to contract to perform their services in the status desired, stating:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. . . ."

The musicians throughout the country collectively, through their union, decided that they would sacrifice any right of control they might have had over the manner and the means of performing their services because they felt the advantages to be gained by working as employees were greater than the advantages they might obtain by performing as independent contractors and retaining the full right of control over their work.

Interveners, pursuant to this decision of their union, insisted upon performing their services for petitioner only under contracts vesting in petitioner the full right of control over the services to be rendered. Those were the only contracts of employment between petitioner and interveners for the services for the engagements involved in this proceeding (R. 389).

Clearly and certainly interveners in performing their work pursuant to these contracts occupied the status of employees for that was the status expressly contracted for.

The Circuit Court of Appeals held that these contracts

on their face established the employer-employee relationship that the parties intended them to establish and should be held controlling in the absence of evidence that the parties abrogated or abandoned the contracts, stating (R. 689-690):

> "A contract therefore which obligationally gives complete control of the services which one person agrees to perform for another to the person for whom the work is to be done—such as does the contract here—establishes on its face the legal relationship of employer and employee as it existed at common law. The relationship is capable of being changed, of course, by an abrogation of the provision for control, through either an express agreement of the parties or an implied agreement from circumstances demonstrative of a mutual abandonment of it. . . ."

The District Court, however, held that these contracts of employment did not establish the employer-employee relationship on their face and should be completely disregarded in determining the employment status of the parties. It is in this that the District Court misinterpreted the law and the authorities it relied upon in support of its decision.

1. The Authorities Cited by Petitioner Do Not Support the Proposition That a Contract of Employment under All Circumstances May Be Ignored in Determining the Employment Status of the Parties to That Contract.

The authorities cited by petitioner in his brief and relied on by the District Court do not support the proposition that a contract expressly fixing the obligations of the parties to an employment relationship is of little or no value in determining their status. The authorities cited by petitioner are concerned only with the factors that should be taken into consideration in determining who has the *right of control* over the services to be performed

under a particular contract of hire, *which does not expressly vest the right of control in either of the parties.*

There is perhaps no rule of law more firmly established in determining the status of parties to an employment relationship than the rule that the person having the right of control over the services to be rendered is the employer of those over whom he has such right of control, and it is entirely immaterial and irrelevant whether or not he exercises that control. This rule of law has been *definitely* and clearly stated in case after case by court after court, without variation or contradiction. 35 *American Jurisprudence*, Sec. 3, p. 445; *The Restatement of the Law of Agency*, Vol. 1, Sec. 220, pp. 483, 489; *Treasury Regulations* 106, Sec. 402.204; 107, Sec. 403.204; *Murrelle* v. *Industrial Commission*, 382 Ill. 128, 46 N. E. (2d) 1007; *Industrial Commission of Colorado* v. *Northwestern Mutual Life Insurance Co.*, 88 P. (2d) 560; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. Ed. 819; *Toplis & Harding* v. *Murphy*, 384 Ill. 463, 51 N. E. (2d) 505; *Peasley* v. *Murphy*, 381 Ill. 187, 44 N. E. (2d) 876; *McDermott's case*, 283 Mass. 74, 186 N. E. 231 (1933); *Claus* v. *De Vere*, 120 Neb. 812, 235 N. W. 450; *Simmons* v. *Kansas City Jockey Club*, 334 Mo. 99, 66 S. W. (2d) 119; *Spencer* v. *Marshall*, 107 Kan. 264, 191 P. 468; *Jones* v. *Goodson*, 121 F. (2d) 176; *Griff Williams* v. *United States*, 126 F. (2d) 129 (*supra*).

Seldom, however, does a contract of employment definitely express which party has the right of control over the services to be rendered and, therefore, in the usual case involving this issue, evidence is introduced to establish who selected and discharged the workmen, who determined the compensation to be paid, who paid the workmen's wages, on whose premises were the services performed, who owned the tools or equipment necessary to perform the serv-

ics, and other similar factors, in order to show *which party to the employment contract had the right of control* over the method and manner of the performance of the work. Such factors are merely the means to reach a determination as to whose was the right of control and all such factors become completely immaterial when the contract of employment clearly discloses in which party to the contract the right of control is vested, for that is the ultimate test to which *all other factors are subservient.*

That it is the right of control alone which is the ultimate determinative factor in an employer-employee relationship and not other facts which may merely indicate right of control was clearly expressed by this Court in the case of *Standard Oil Co.* v. *Anderson* (*supra*) as follows:

> "And further (page 225 of 212 U. S. 29; S. Ct. 252, 255: 'In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. *They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control'.*" (Italics ours.) (See also 35 American Jurisprudence Sec. 3, p. 445.)

It is only when the contract of hire does not reveal whose is the right of control that a contract becomes merely "an element that may be considered by the fact finder if of any assistance in determining what is the true relationship" (R. 660) under the authorities cited by petitioner.

The Restatement of the Law of Agency, Sec. 220, does not hold that all contracts of employment regardless of their terms are but one element to be considered in determining the status of parties to an employment relationship. It refers only to contracts in which "the extent of control" is not clearly indicated and thus is in dispute, and holds that under such circumstances it is proper for one to ex-

amine the contract of hire to determine how much control is provided for by its terms along with other factors.

Where the agreement of the parties is definite concerning the question of the right of control, it is conclusive in determining the employment status of the parties. This is the rule of law as expressed in Sec. 221 of the *Restatement of the Law of Agency*, (the section which is concerned with employment relationships in which the status of the parties is clearly defined) as follows:

> "To constitute the relationship of master and servant, the one for whom the service is rendered must consent or manifest his consent to receive the services as a master."

In comment (a) under this section (p. 491) it is clearly and definitely stated:

> "If, however, the one for whom the service is rendered consents to its being performed under his directions and understands that he is in control, the service is rendered by his servant."

Nor does the case of *Williams* v. *United States* (*supra*) support petitioner's position. In fact the decision in that case supports the decision of the Circuit Court of Appeals in the instant case, for both courts looked to the contracts of hire to determine which party had the right of control. The Seventh Circuit Court of Appeals in the *Williams* case stated:

> "*The status of the parties was plainly fixed by the contracts*, including the rules of the Federation, and there is no room for argument that the establishments had any right of control" (p. 132). (Italics ours.)

The Circuit Court of Appeals in this case made the same holding in principle in the following language:

> "On these facts we think it must be held that the parties in their negotiation and execution of the contract had

specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra-members and so had created the common-law relation of employer and employee between them, at the time the contracts were executed at least" (R. 691).

The case of *Spillson* v. *Smith*, 147 F. (2d) 727, is to the same effect as the *Williams* case (*supra*). The Court looked to the contract of hire to determine the question of whose was the right of control.

In each of the cases cited by petitioner the contracts of employment involved did not designate which party had the right of control over the services to be performed, but merely used descriptive words designating the status of the parties, or the Court found that the parties had functioned in a manner inconsistent with the terms of their employment contract and had thus abandoned it.

We do not contend nor did the Circuit Court of Appeals hold that a desired employment relationship can be created by the use of mere descriptive words in the contract of hire without granting rights and fixing obligations. But we do contend and the Circuit Court of Appeals did hold that, "A contract . . . which obligationally gives complete control of the services which one person agrees to perform for another to the person for whom the work is to be done . . . establishes on its face the legal relationship of employer and employee as it existed at common law" (R. 689).

In the cases of *Williams* v. *United States* (*supra*), *Spillson* v. *Smith* (*supra*), *Hargis* v. *Wabash R. R. Co.*, 12 Labor Cases 70, 327, and others of a similar vein cited by respondents, the courts merely held that descriptive words in a contract of hire can in no way be determinative of the status of the parties.

We do not contend nor did the Circuit Court of Appeals hold that a contract of employment definitely and clearly establishing the status of the parties to the contract may not be varied by acts of the parties in the performance of the contract which are inconsistent with the relationship established by the contract.

In the cases of *Matcovich* v. *Anglim*, 134 F. (2d) 834; *Gulf Refining Co.* v. *Brown*, 93 F. (2d) 870; *Commissioner* v. *Tower*, 327 U. S. 280, 66 S. Ct. 532; 90 L. Ed. Adv. Op. 559; *Bertino* v. *Marion Steam Shovel*, 64 F. (2d) 409, and the rest cited by petitioner, the court found that the conduct of the parties was inconsistent and at variance with the contracts of employment, and on that basis held the contract not determinative of the status of the parties. Had the parties performed the contracts in accordance with their terms and provisions and not substituted other agreements, the original contracts of hire would have been held to have determined the relationship of the parties.

None of the cases cited by petitioner held that a contract of employment expressly vesting the right of control in the employer is not determinative of the relationship in the absence of evidence of acts of the parties inconsistent with the contract.

We acknowledge the law to be that the conduct of the parties in the performance of their contract of hire must be consistent with the terms of their contract and that evidence of inconsistent conduct and acts may establish an abrogation or abandonment of the contract.

2. The Performances of the Form B Contracts by Interveners and Petitioner Were Consistent With the Employer-Employee Relationships Established by Those Contracts

None of the evidence in the instant case establishes any inconsistency between the performance of the contracts of employment and the terms and conditions of those con-

tracts, therefore the employer-employee relationship expressly created by those contracts was not abrogated by the acts or conduct of the parties nor was a different agreement substituted.

a. *Petitioners' failure to exercise control over the services of the musicians was not inconsistent with the employer-employee relationship.*

Evidence concerning the fact that petitioner might not have chosen to exercise all of the control vested in him by the contract of hire and that interveners might have exercised the greater amount of control, does not establish conduct inconsistent with the terms of the Form B contract and the employer-employee relationship established by that contract. Nor is the fact that, "If the owner attempted to exercise any such right of taking charge and control of the orchestra it would destroy the orchestra and the result of a satisfactory entertainment" (R. 662) inconsistent with the terms of the Form B contract.

As we pointed out heretofore, it is the *right to exercise the control* over the work to be performed and not the actual exercise of control that is the determining factor of an employer-employee relationship (*supra* pg. 20-21).

There is nothing particularly unique or unusual in a person having the right of control not actually exercising that control because to do so would interfere with and make unsatisfactory the performance of the work the employer desired to have done. In hundreds of cases employees are hired precisely because they do have a particular skill that the employer cannot perform. For example, a watchmaker in a jewelry shop, a chef in a hotel dining room, a linotype operator for a newspaper, a crew of longshoremen, etc.

It is no different with petitioner and the orchestras engaged in the furtherance of his business of operating a

ballroom. Leaders of orchestras are skilled in the art of directing groups of musicians so that a particular and desirable type of music is produced which attracts patrons to the ballroom in furtherance of the business of operating the ballroom. And it is not inconsistent with the contracts of employment and the vesting of the right of control in the petitioner that petitioner did not choose to interfere with the manner in which the orchestras were operated, for he had engaged the services of persons highly skilled in such endeavor to perform those services for him.

The courts have never experienced any difficulty in answering the arguments of those who would escape their liability as an employer on the grounds that they just could not exercise the right of control; for example, that precise argument apparently was raised in the case of *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. Ed. 819 (*supra*), in which the owner of a boat sought to escape liability for the negligence of his pilot. This Court stated in holding the owner liable:

> "The doctrine that the owners are responsible for the acts of their agents and employes ought not to be discarded because the selection of a pilot by the owner is limited to those who, by the State, have been found by examination to possess the requisite knowledge of the difficulties of local navigation, and the requisite skill to conduct a vessel through them. 'As a general rule' says Justice Grier, in the case of The Creole, 'masters of vessels are not expected to be and cannot be acquainted with the rocks and shoals on every coast (and, we may add, with the currents and shoals of every river) nor able to conduct a vessel safely into every port. . . .'"

See also *Toplis & Harding* v. *Murphy*, 384 Ill. 463, 51 N. E. (2d) 505 (*supra*); *Peasley* v. *Murphy*, 381 Ill. 187, 44 N. E. (2d) 876 (*supra*); *Claus* v. *De Vere*, 120 Neb. 812, 235

N. W. 450 (1931) (*supra*); *Simmons* v. *Kansas City Jockey Club*, 334 Mo. 99, 66 S. W. (2d) 119 (1933) (*supra*); and *McDermott's* case, 283 Mass. 74, 186 N. E. 231 (1933) (*supra*), in which it was stated:

> "One may be a servant though far from the master, or so much more skilled than the master that actual direction and control would be folly, for it is the right to control rather than the exercise of it that is the test."

In holding that petitioner was not the employer of intervener because intervener and not petitioner had exercised the greater amount of control over the services of the orchestra, the District Court fell into the error of failing to recognize that while evidence of who actually exercised control over the work performed under a contract establishing an independent contractual relationship is material and relevant to establish a variance between the terms of the contract and the performance of the contract, such evidence is immaterial and not relevant to establish the abrogation or abandonment of a contract which created an employer-employee relationship.

The distinction arises from the fact that an employer may delegate to one of his employees the duty of actually exercising control over other employees,[6] but an independent contractor cannot delegate the actual control over his work to the person for whom he is performing work and function consistent with the contract of employment. To establish an independent contractual relation, the contract of hire must meet two requirements: (1) vest the full right of control over the services to be performed in the independent contractor and (2) divest the person for whom

[6] It might be noted that business is generally carried on by the employer delegating the exercise of control to an employee, often because the employer, through a lack of knowledge and experience is incapable of exercising control.

the work is being performed of all right of control. The exercise of control by the person for whom the work is being performed would therefore tend to establish an abandonment of those provisions of the contract vesting the right of control in the independent contractor and divesting the other party of any right of control. However, since an employer may delegate control to an employee, the fact that the employee and not the employer may actually exercise control in no way establishes a variance with an employer-employee relationship so long as the employer retains the right to exercise control.

The cases cited by petitioner in support of his argument that because interveners exercised control, petitioner was not an employer under the terms of the contract are not in point, for all are concerned with the abrogation of independent contractual agreements because the contracts were not performed in accordance with their terms.

Nor is it material that petitioner did not discharge any of the musicians in the orchestras he employed. The petitioner had the right to discharge any member of the orchestra since he was given the full right of control over the services to be performed, and his failure to exercise this right is not evidence that he did not have the right to do so. Interveners would have carried out petitioner's orders to discharge or hire a member of the orchestra if directed to do so (R. 383, 628-629), and interveners did not refuse and would not have refused to carry out any of petitioner's orders but would have carried out any order given to them (R. 384, 386, 387, 626-627).

If petitioner's argument is at all tenable, an employer could readily escape his tax liabilities by merely delegating control to an employee and refraining from exercising the control while retaining the right to exercise control if he deemed it necessary at any time.

The fact that petitioner did not exercise the control vested in him by the contract, therefore, does not establish any variance between the terms of the contract and the performance of that contract.

b. *The evidence in the record concerning the manner in which the orchestras were formed and functioned does not establish any inconsistency between the performance of the Form B contract and the established employer-employee relationship.*

Nor does the evidence in the record to the effect that the musicians employed had been formed into organized groups by interveners (R. 329), were rehearsed by interveners (R. 355), that interveners handled the distribution of the musicians' wages (R. 359) and arranged the transportation of the musicians to the place of employment (R. 357), sometimes in buses owned by interveners (R. 167), establish any inconsistency between the performance of the contracts of employment and the employer-employee relationship established by those contracts.

(1) Musicians Were Organized Into Groups

The fact that the musicians were organized into groups or orchestras and rehearsed prior to being engaged by petitioner is no more than a necessary circumstance in the unique employment of furnishing musical entertainment. In this field of employment, it is necessary that men band themselves together because their particular skill in the performance of their work is enhanced and their value to those who would engage their services increased as a result of these practices and acts (R. 371). Their individual efforts must blend together so that a highly pleasing harmonious effect is produced which is agreeable to the senses of the patrons of the ballroom. Without that

ability to perform together, their value to the petitioner would be lessened and his profits from their work reduced.

The business man who finds it to the advantage of his particular business to employ men in organized groups or bands is no less an employer than the one whose business does not require the employment of organized groups. The basic legal effect and result of the employment is not altered or changed by the method through which men are employed, by groups or individually, *Spencer* v. *Marshall*, 107 Kan. 264, 191 Pac. 468 (1920) (*supra*). And certainly the mere fact that the musicians involved herein had banded themselves into a group prior to their employment by petitioner in no way establishes an abrogation or abandonment of their employment contract.

(2) Interveners Arranged Transporation

Nor does the fact that interveners arranged for the transportation of the orchestras to the place of employment change the status which existed between petitioner and interveners under the contracts, for that fact is not inconsistent with an employer-employee relationship. The transportation of the orchestra in a group is a factor necessarily inherent in group employment when to obtain employment the group must travel from one engagement to another. It is merely a means of keeping the group together and insuring, to some extent, their arrival at the place of employment. Also, it relieves the employers of musicians of the burden of arranging and providing transportation.

That the means of transportation was maintained by some of the leaders[7] does not abrogate nor affect their con-

[7] Few orchestra leaders own buses and the rules of the American Federation of Musicians closely regulate the charges that can be made for transporting brother members of the Union (R. 255, 368). The record

tracts in any way. See case of *Willard Sugar Company* v. *Gentsch* (59 F. Supp. 82) in which truckdrivers who owned and maintained their own trucks, and even engaged helpers were held to be employees of the concerns using their services.

(3) Petitioner Did Not Negotiate Individual Wages

The fact that petitioner did not negotiate and determine the individual wages of the musicians he employed does not vary the contract nor destroy the employer-employee relationship.

Minimum wages were established by the Union (R. 68). Had petitioner desired to pay more he certainly was free to do so as the employer of the musicians. Petitioner did negotiate the total cost of the orchestra and he did have the right to demand that he be advised of the exact amount paid to each man. His disinterest in ascertaining that information does not relieve him of his employer responsibilities.[8]

But even if, for the purpose of argument only, we accept petitioner's contention that the failure to advise petitioner of the exact wages of each of the individual musicians destroyed the employer-employee relationship (which we definitely contend it did not do), such contention could have no effect on interveners Hill and Fisher for they did supply the information (Pltf's. Ex. T, R. 82, 89; Pltf's. Ex. A-1, R. 99).

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shows that Intervener Moorhead owned a bus, Intervener Williams did not and it is silent as to the other interveners. Usually the leader arranges for transportation by public carrier and under the rules of the American Federation of Musicians, the cost of transportation by public carrier or privately owned buses, must be paid by the person engaging the orchestra (R. 368).

[8] Petitioner testified that in the early days of the Form B contract the information concerning the wages of the individual musician was sometimes omitted from the Form B contract, but at the time of trial this information was provided (R. 113).

The fact that interveners often contracted for a share of the gross receipts does not vary the employer-employee relationship, for employees often work on profit-sharing plans. The laws of the Union, however, require that interveners receive at least Union scale (R. 368).

(4) Interveners Distributed Wages

The fact that the leader of the orchestra might have distributed the wages to the sidemen rather than petitioner distributing the wages himself, surely is not inconsistent with the terms of the Form B contract nor at variance with the employer-employee relationship. The distribution of the wages by the interveners on behalf of petitioner is merely a convenience for petitioner and also is a device by which the Union may more easily police its members and make certain that all are receiving the minimum wages required by the laws of the Federation, and not "kicking back" to the employer.

The method and manner of compensation is neither important nor controlling in determining whether or not the relationship of master and servant existed, and the fact that the petitioner did not personally hand over the wages to the individual musicians does not abrogate the contract of hire. See *Jones* v. *Goodson*, 121 F. (2d) 176 (*supra*) and cases cited therein at page 179.

(5) Musicians Furnished Own Instruments

Concededly, the musicians furnished their own instruments except the piano. But this is not inconsistent with an employer-employee relationship. It is only one of the factors usually taken into consideration to determine who had the right of control over the services in an employment relationship, because once it is ascertained who had the right of control over the services, the status of the parties to the employment relationship is immediately apparent. If the right of control is clearly vested in one of

the parties by the contract of hire one examines facts only to determine if that conract was abandoned or abrogated in ascertaining the relationship of the parties.

(6) No Material Change in Manner Orchestra Actually Operated

Even if we concede that the manner in which the orchestras functioned after the adoption of the Form B contract was the same as before its adoption, that fact would not establish any inconsistency between the terms of the contract establishing the employer-employee relationship and the performance of that contract.

Assuming that interveners were independent contractors in their respective employment relationships with petitioner prior to the Form B contract, the answer to petitioner's argument that because of this fact interveners were not employees of petitioner in their respective employment relationships under the Form B contract is simple and best phrased by an interrogation, namely: Is a person who once performed work for another in the capacity of an independent contractor barred in law from performing similar work for that person in the status of an employee?

If interveners were indeed independent contractors in their respective relationships with petitioner under the contracts of hire used prior to the Form B contract, and if, because of this fact they may not again perform work for petitioner in any status other than that of independent contractors unless they break up the organized groups, require petitioner to direct and rehearse the orchestra, select the musical arrangements, provide for transportation, etc., then petitioner's argument is tenable. But if there are no such restrictions in law, then that fact is completely immaterial in determining the relationship of the parties.

An examination of the decision of the court in the case of *Williams* v. *United States* (*supra*), would seem pertinent at this point since the Williams involved therein is the same

Williams who is an intervener in the instant case, and it was he who testified that there was no material difference in the manner in which the orchestra's services were performed for petitioner after the Form B contract. The decision of the Seventh Circuit Court in that case will conclusively demonstrate that had the parties performed the engagements involved therein pursuant to the Form B contract, Williams would have been held the employee of the establishments engaging his services and also the members of the orchestra because the establishments would have had the right of control over the services to be rendered. The Court held in the *Griff Williams* case that the contracts between Griff Williams and the establishments engaging the orchestra determined the status of the parties (*supra* pg. 22).

The Court clearly indicated in the following language that had the contracts of the parties vested in the establishments the right of control over Griff Williams and the musicians, Griff Williams would have been held an employee even though the establishments did not actually exercise control:

> "The test usually employed for determining the distinction between an independent contractor and an employee is found in the nature of the amount of control reserved by the person for whom the work is done. There seems to be no dispute but that the employer-employee relationship exists only where the person for whom the work is done has the *right of control* and directs the work, not only as to the results to be accomplished by the work, but also as to the details and means by which that result is accomplished. . . . Plaintiff agrees that '*it is the right and not the* exercise which is the determining element.'" (Italics supplied.)

Thus had Williams submitted himself to the control of the establishments for which he rendered services, he would have been held their employee. After June of 1941 he, as well as all other interveners, did submit himself to the control of petitioners in the performance of their work, and by so doing they became employees of petitioner, unless in law, they were restricted from performing their work in any status other than that of independent contractors.

It follows that there is no inconsistency between the employer-employee relationship created by the contract between petitioner and interveners and the fact that interveners might have changed the personnel of the orchestra at times prior to the engagements with the petitioner. Assume interveners had the right to change the personnel of the orchestra and had exercised that right prior to their engagements with interveners, certainly they could surrender that right to petitioner and vest it in him while performing services for petitioner.

Petitioner relies upon the case of *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, to support an argument that the Form B contracts did not create the employer-employee relationship because in some respects the orchestras might have functioned similar to the manner in which independent businesses are sometimes operated. The case of *Metcalf & Eddy* v. *Mitchell*, however, does not support this contention of petitioner. In fact the case of *Metcalf & Eddy* v. *Mitchell* would seem to support the contention of interveners that they could perform their services as employees if they submitted to the control of those who would engage them, the court stating:

> "Nor do the facts stated in the bill of exceptions establish that the plaintiffs were 'employees' within the meaning of the statute. So far as appears, they were in the position of independent contractors. *The*

> *record does not reveal to what extent, if at all, their services were subject to the direction or control* of the public boards or officers engaging them. . . ." (Italics ours.)

Thus had the engineers involved in that case subjected themselves to the direction or control of the public boards or officers engaging them, they would have been held employees and not independent contractors.

But even assuming for the purpose of argument that the formation of the orchestras by interveners and the manner in which interveners' names were advertised by booking agents, and the manner in which the orchestras operated in regards to the changing of personnel and the obtaining of employment,[9] made interveners independent contractors and the employees of the musicians while the orchestra was not engaged in the performance of musical entertainment (a status we contend was not created by these factors), that would not change the relationship between petitioners and interveners on the occasions involved herein and would not have constituted acts inconsistent with the employer-employee relationship created by the Form B contract.

As stated by the Circuit Court of Appeals (R. 694):

> "Clearly, a person can be an independent contractor in one part of his activity and an employee in another. Cf. *Coules* v. *J. C. Mardis Co.*, 192 Ia. 890, 181 N. W. 872. And, even if the general relationship of a leader to his orchestra-members outside the specific engagements was such that the Commissioner of Internal Revenue could have insisted that the leader should pay social security taxes on his orchestra-members

[9] Some orchestra leaders in order to hold the group together paid certain amounts to the sidemen each week. The record does not show which of interveners had such arrangements with the sidemen, but it does show that Williams at least had no such arrangement and the members of the orchestra he led received pay only when they worked, just as Williams' income depended upon finding employment (R. 367, 390-391).

all the way down the line and that the brief legal relationships of employer and employee created with the ballroom operators would be ignored for practical purposes of the Treasury in collection or handling or for other reason, this would not help the ballroom operators here. The Government not infrequently has the right to choose between legal and practical situations in tax matters, *Higgins* v. *Smith*, 308 U. S. 473, 476, 477, 60 S. Ct. 355, 84 L. Ed. 406, but the right to make the choice in such an alternative situation is the Commissioner's, and a taxpayer who has a legal liability for the tax cannot complain of the choice. Courts are concerned only with the legality of what is done in matters of taxation and not with the wisdom or policy of the action."

3. Interveners Met Every Requirement in Law to Create the Employer-Employee Relationship and to Perform Their Services Pursuant to That Employment Relationship.

If musicians, playing in organized groups, are not able to render their services as employees through the means of submitting themselves to the direction and control of their employer by vesting in their employer by expressed contract, the full right of control over their services, then how can such a status be created?

Must the musicians disband their orchestras and require those who must employ musicians in the furtherance of their businesses to hire musicians individually rather than in groups?

Must orchestras function without leaders, leaving up to the operators of the ballrooms the task of ordering rehearsals, determining the costumes, arranging and seating the musicians and actually directing the orchestra in the performance of its service, in order for the musicians to obtain the status of employees of those engaging their services?

To be an employee, must a leader refuse to arrange for the transportation of the members of the orchestra?

If the musicians insist that they receive their wages provided for in the Form B contract from the operator of the ballroom himself rather than through the leader, can they then become employees of the ballroom operator?

Must the petitioner personally negotiate the wage of each individual musician before they can perform their services as his employees?

Shall they refuse to furnish their own instruments, and other equipment?

Just what more could interveners have done to establish an employer-employee relationship between themselves and petitioner than was done by the Form B contract?

Had the petitioner hired any one of the interveners individually as a leader, and then hired severally ten or twelve other musicians, there would have been no difference in the way the assembled orchestra would have operated. The job of judging the merits of the musicians, of directing the orchestra, arranging the seating, determining the instrumentation, selecting the music, working out the arrangements and musical effects, and all the other necessary incidentals to musical entertainment would have been left to the particular intervener hired, for he would be talented and skilled in such matters, and he would have been hired to exercise that talent and skill in the furtherance of petitioner's business. If petitioner was dissatisfied, wanted a certain man hired or another one fired, wanted different seating arrangements, wanted different musical arrangements, he could order his desires carried out. And he could have done all this under the Form B contract.

If, then, it is lawful for a person or a group of persons to insist that they will perform work only under an employer-employee relationship, the musicians involved in the instant case could not have done more to obtain this relationship than was done in this case.

Only if the intervener's contracts were subsequently varied either by agreement of the parties or by their conduct and acts in the performance of the contracts could it be held that their status was changed. There is no evidence in the record of any variance between the performance of the contract and the terms of the contract.

The fallacy of the reasoning of petitioner and the District Court, that a contract of hire expressly and definitely fixing the obligations and status of parties is of little or no consequence and may be ignored as though it never existed in determining the status of the parties to the employment contract, is immediately apparent when viewed in the light of the following hypothetical case: Assume that the petitioner decided that there might be times when an orchestra might not function as he felt it should in the interest of his business of operating a ballroom and that he would therefore engage members of orchestras only on an employer-employee relationship basis so that he would have the full right of control over the musicians, the leader included, in the performance of their work. And assume that pursuant to that decision he had insisted upon hiring interveners only under contracts expressly providing that he, petitioner, should be the employer, should hire the musicians severally and have the right of control over the members of the orchestra in the performance of their services. (Assume a contract identical in every respect with the Form B contract). And assume that the contract was performed just as the evidence shows the contracts in the instant case were performed, and that all of the facts and circumstances were identical to the instant case.

Could **petitioner** seriously argue that under such circumstances the contract of employment did not create on its face the employer-employee relationship and that it was not controlling but should be disregarded in determining petitioner's tax liability under the Social Security Laws?

Could petitioner contend that since he had not desired to actually exercise his right of control he was not the employer? Could petitioner contend that since the orchestra leader had previously formed the orchestra, had arranged the means of transportation to the ballroom, rehearsed the orchestra, arranged the seating of the orchestra, determined the program, and actually directed the orchestra in the performance of the work, he, the petitioner, was not the employer even though he had insisted upon hiring the members of the orchestra only as his employees and had insisted that the full *right* of control be vested in him under the contract of hire? If intervener had objected to entering into such a contract and wanted to perform as an independent contractor and became a party to the contract when employment was available only on the terms stated by petitioner, could petitioner argue successfully that intervener and not he was the employer because of this fact?

Obviously, the contract would be held controlling concerning the status of the parties to the employment relationship because such contract would have created by its terms the employer-employee relationship in the first instance and it would have been performed consistent with its terms.

Yet, the only difference between that situation and the facts in the instant case is the party which insisted upon the employer-employee relationship as a condition of employment.

If the interveners were able to contract to perform their services as employees of petitioner, then none of the arguments of petitioner in support of his position that the petitioner did not have the right of control are tenable. If it can be said that the factors relied on by petitioner affect the relationship of employer-employee as expressly created by the contract of hire, "It is the equivalent of saying that the leaders and members of organized orchestras are un-

able legally to become employees of those for whom they perform engagements." (Majority Opinion, C.C.A. (R. 693).)

All of the factors now relied on by petitioner to escape his obligations as an employer, "were known to the parties at the time the contract was made and to which they manifestly chose to give no significance in obligationally fixing the power of control to create an employer-employee relationship for the particular engagements" (R. 698). And it would have been no different had **petitioner** insisted upon occupying the status of an employer.

Surely, then, the contracts involved in the instant case established the employer-employee relationship and must be held controlling in determining the employment status thereunder in the absence of any evidence of an abrogation or abandonment of those contracts.

4. The Form B Contracts Cannot Be Ignored in Determining the Status of the Parties Thereunder Because They Allegedly Were Not Entered Into by Fair Negotiations.

The District Court held (R. 663) and the petitioner contends that the contracts of employment involved herein did not create an employer-employee relationship and should be ignored in determining the status of the parties because they were not entered into as a result of fair negotiations.

The Form B contracts involved herein were no more and no less than the result of collective bargaining between the members of the Musicians Union and those who would engage the services of musicians, members of the Union. Union members would render services only under the terms of this uniform agreement. All that possibly can be inferred from the evidence in the record is that petitioner could obtain the services of musicians, who were members of the American Federation of Musicians, only under the

terms and conditions of employment that those members collectively, through their Union, prescribed and not upon the terms and conditions of employment that petitioner desired (R. 53, 110, 123, 125).

The fact that members of a labor organization will render services only under a particular contract prescribing particular terms and conditions of employment, does not make such a contract invalid under any doctrine in law or equity, when entered into by one desiring, or in fact even requiring, the services of the members of the Union.

As stated in *Maisel* v. *Sigman* (1924) 123 Misc. 714, 205 N.Y.S. 807:

> "Workingmen are at liberty to withhold or to give their labor upon such terms as to them seem proper, so long as they do not violate an express contract or statute, and so long as their primary object is not the gratification of personal malice;"

See also *Coppy's Inc.* v. *Dongan* (1943) 46 N.E. (2d) 538; *Glicman* v. *Barker Painting Co.* (1930), 227 App. Div. 585, 238 N.Y.S. 419.

Surely in the instant case the means employed by interveners to obtain the conditions of employment they desired was not unlawful. No threats were made to prevent petitioner from operating; in fact there was not so much as a request made that petitioner not employ non-union musicians. All that was done was that petitioner was informed that interveners would render services only under the conditions of employment provided for in the Form B contract, and petitioner was forced through this use of economic pressure to contract to employ the musicians as his employees (R. 53, 110, 123, 125). This we submit does not constitute grounds for voiding the contracts and refusing to hold that an employer-employee relationship was established by their terms.

The conventional manner by which organized workmen are able to obtain those conditions of employment which they desire, is to withhold their labor and the conventional means by which an employer is able to obtain workmen under the terms of employment he desires is to refuse to hire workmen under any other terms or conditions of employment than those he offers. When the parties disagree on the terms and conditions of employment that should prevail, a labor dispute, to a greater or to a lesser degree, is the result. The agreement which ultimately might result and bring about a termination of the dispute surely is not an invalid agreement because one of the parties would not offer employment, or one of the parties would not accept employment, under the terms originally proposed. If such an agreement were held to be invalid and one that may be disregarded in determining the rights and obligations of the parties prescribed therein, then collective bargaining becomes a useless and meaningless thing.

Had the disputed terms of the contracts involved herein been over wages to be paid and had petitioner met the demands of the musicians because they would not work for the amount petitioner might have proposed, could the petitioner claim the contract was not binding upon him—even after the musicians had rendered their services—because he had objected to the amount of the wages demanded by the musicians prior to hiring them? Of course not. Then on what basis can it be contended that the Form B contracts in the instant case are invalid and of no materiality in determining the status of the parties because the musicians insisted on working under certain specified terms and conditions of employment?

5. Petitioner's Contention That He Justifiably Believed the Form B Contract Did Not Create the Employer-Employee Relationship, Is Not Supported By Any Evidence and Cannot Change the Status of the Parties under the Clear Language of the Contract.

The petitioner could not have justifiably believed that the Form B contract did not create the employer-employee relationship. The record in this case clearly establishes, without one iota of testimony to the contrary, that petitioner knew that under the terms of the Form B contract he would occupy the status of the employer of the musicians.

Petitioner testified that he read the contract and objected to those parts of the contract which would make him the employer of the members of the orchestra (R. 104, 108-110). He testified that he knew the contract changed the employment status, stating (R. 120):

"Q. Well, did you object to the contract because you thought it was changing the status?

A. Changing the status how?

Q. That it made you the employer of these side men?

A. That's right.

Q. And yet you signed the contract, isn't that right?

A. I had to stay in business.

. . . . . .

"Q. Now let me ask you, Mr. Barjels; am I correct that you objected to signing this contract because you thought it changed the status?

A. Yes.

Q. Now did you continue to think it changed your status and your relation to the musicians?

A. I still do.

Q. And you did all the time, is that correct?

A. That's right."

In support of his contention that petitioner could justifiably believe that the Form B contract did not change his status, petitioner cites testimony to the effect that on one occasion a booking agent told him that the Form B contract would not change his status (R. 116). But there is not one word of testimony in the record that this booking agent had any authority to vary the Form B contract. In fact the record shows clearly that petitioner knew the contract could not be varied by this booking agent and that union musicians would perform for him only in the status of employees. Petitioner testified in this regard as follows (R. 118, 119).

"Q. And you knew at that time that Mr. Petrillo was President of the American Federation of Musicians?

A. Yes, sir.

Q. And you knew too that the members including the side men and leader who were to play under this contract were members of the American Federation of Musicians, didn't you?

A. Yes, sir.

. . . . .

Q. Did you know that the rules of the American Federation of Musicians were binding on you?

A. They were binding on me and also on the orchestra leader."

But even if the unauthorized statement of the booking agent relied on by petitioner did vary the particular contract entered into on the particular occasion when the statement was made (but we definitely state it did not and could not vary the contract), the other contracts involved in this case were not varied by any purported waiving of their conditions by interveners or any booking agent (R. 120, 121, 123, 124) and the evidence cannot affect the relationship of petitioner and the other interveners.

We acknowledge the fact that petitioner did not wish to sign the contract containing provisions which would make

him the employer. When he found out that the interveners insisted upon that provision in the contract or they would not enter into his employment, petitioner executed the contract (R. 53). Obviously, he entered into the contract because he felt that in the furtherance of his business it would be more to his advantage to accept the full right of control over the orchestra, employ the members of the orchestra severally and become the employer of the musicians, than to hire other musicians, less skilled, under some other terms and conditions of employment. But that is not evidence that petitioner had justification for believing that the Form B contract did not place him in the status of an employer in relation to the musicians.

The terms of the contract were perfectly clear. When petitioner entered into that contract he assumed the status of an employer and he cannot now escape his liabilities on the basis that he had justification for believing the contract did not accomplish that which it was specifically and expressly designed to accomplish.

6. The Incorporation of the By-Laws of the American Federation of Musicians by Reference Into the Form B Contract Did Not Change the Employer-Employee Relationship Created by That Contract.

Petitioner's contention that the Form B contract did not create the employer-employee relationship because it incorporated the by-laws of the American Federation of Musicians is untenable. When the Form B contract was promulgated by the president under the powers of Article I, section 1 of the Constitution of the American Federation of Musicians, and was affirmed by the Convention and incorporated into the By-laws and Constitution of the American Federation of Musicians and made a part thereof, all of the provisions of the Constitution and By-laws contradictory to

the Form B contract were thereby either automatically repealed or modified. This is an established principle of statutory construction. As stated in 50 *American Jurisprudence*, Sec. 34, p. 333:

> "Indeed, one of the recognized rules of construction of statutes is to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and the defects in the old law sought to be remedied by the new statute . . . Accordingly, every statute which is properly the subject of judicial construction should receive such interpretation as will not conflict with general principles, but, to the contrary, which will make it harmonize with the pre-existing body of law."

See also *McGraw* v. *Seigal*, 221 Iowa 127, 263 N. W. 553

Further, the Form B contract expressly vests the right of control in the party engaging the services of the musicians, and it is undisputed that the purpose of the Form B contract was to create the employer-employee relationship. It is a settled rule of contract interpretation that a contract will be interpreted to carry out the intention of the parties and in the event of conflict in the provisions, the contract will be interpreted to carry out its main purpose.

As stated in 3 *Williston on Contracts*, Sec. 619, p. 1781:

> "The Court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless and inexplainable, and if this is impossible, an interpretation which gives effect to the main apparent purpose of the contract will be favored."

The contracts involved in this case then clearly and unequivocally vested in petitioner the full right of control

over the musicians in the performance of their work for petitioner, and under the universally established rule of law where petitioner accepted this right of control and the musicians expressly submitted to the control of petitioner, an employer-employee relationship was created between petitioner and the musicians petitioner engaged.

B. THE FORM B CONTRACTS CANNOT BE DISREGARDED IN DETERMINING THE RELATIONSHIP OF THE PARTIES ON THE GROUNDS THAT IT WAS ENTERED INTO TO ESCAPE TAXATION.

Petitioner further argues that the contract of employment should be disregarded because the District Court found that the contract "was required by the leader to be entered into as an anticipatory arrangement to escape taxation" (R. 663). There are two simple and direct answers to that argument: (1) the Form B contract was not an anticipatory arrangement to escape taxation and there is not one iota of evidence in the record that it was; and (2) in any event a taxpayer may lawfully change his status to avoid taxation.

(1) The Form B contract was not an anticipatory arrangement to escape taxation.

We acknowledge that the law is well established that taxpayers cannot deprive the government of taxes through the medium of artfully drawn contracts, unreal corporations or any other anticipatory arrangements if there is no actual change in the status of the taxpayer. This is the law as expressed in the cases of *Griffith* v. *Commissioner*, 308 U. S. 355; *Moline* v. *Commissioner*, 319 U. S. 436. However, the instant case does not involve any effort to escape taxation. The Form B contracts were neither adopted by the American Federation of Musicians, nor entered into by the parties in the instant case for the purpose of depriving the government of taxes; and the law, as expressed in the cases

of *Griffith* v. *Commissioner* and *Moline Properties* v. *Commissioner*, is not applicable here.

In all of the cases which have come to our attention involving the question of whether or not a contract or a corporation, or some other arrangement, was real or merely a sham to evade and escape taxation, the department of the government charged with the responsibility of ferreting out tax-evasion schemes and protecting the government from tax evasion, was the moving party to expose the sham devised by the taxpayer to escape taxation. Such is not the case here. In fact just the opposite situation exists in this case: Here the government on numerous occasions has given serious consideration to the type contract involved and has issued its official rulings that persons engaging the services of musicians under the terms of the Form B contract are liable for social security taxes (R. 509-535).[10]

Had there been any evidence of fraud or bad faith in the Form B contract, or had the slightest intent been apparent to employ the contract for purposes of tax evasion, the Bureau of Internal Revenue would never have decided as positively as it has decided, on the numerous occasions in which the question has been raised, that in regards to engagements played pursuant to the provisions of the Form B contract the leader and members of the orchestra are the employees of the establishment engaging their services.

If the Form B contract is no more than a fraud, not actually establishing the status of the parties to the contract but a device to evade taxation, then the Bureau of Internal Revenue is a party to a fraud and tax-evasion

[10] It is significant these rulings came after the decision in the *Griff Williams* case (*supra*), 126 Fed. (2d) 129, in which the Seventh Circuit Court of Appeals had decided in favor of the Government's contention and had held that under the provisions of the contracts of employment before it (not Form B contracts) the orchestra leader had the right of control over the members of the orchestra and was the employer.

scheme because the Form B contract was fully discussed with officials of the Bureau of Internal Revenue prior to its adoption as an amendment to the Constitution and By-laws of the American Federation of Musicians, and the Bureau of Internal Revenue after fully investigating the nature of the operations and functions of orchestras approved the Form B contract and issued its official rulings.

If the petitioner is contending that the government and the interveners are in a conspiracy to assess taxes wrongfully against him, let him make such allegations in a complaint and prove them in court. Such allegations are not made in the instant case, and no such proof was offered at the trial.

The American Federation of Musicians, prior to the adoption of the Form B contract, had consistently taken the position that the members of orchestras, including the leaders, were the employees of the persons or establishments engaging the services of orchestras and that the members and leaders of orchestras were subject to the direction and control of the person engaging their services. This was the position taken by Griff Williams, a member of the American Federation of Musicians, in the case of *Griff Williams* v. *United States* (*supra*). The Treasury Department disagreed with this position. The United States District Court in its decision in the *Griff Williams* case (*supra*) sustained the position of the American Federation of Musicians. (*Griff Williams* v. *U. S.*, 38 Fed. Sup. 536 (*supra*).) It was after this favorable decision had been handed down and before the Circuit Court of Appeals had reversed the District Court, that the American Federation of Musicians adopted the Form B contract and incorporated it into its Constitution and By-laws and required its members to render services only under this contract.

The principal purpose of the Form B contract was, as President Petrillo stated it to be in his letter to the Local Unions directing the use of the Form B "for the purpose of protecting our members under the Social Security Laws" (R. 659). But that does not make the Form B contract a tax evasion scheme.

The ramification of the decision of the members of the Union to render services only as employees of those engaging their services go far beyond the mere question of payment of Social Security taxes.

The members of the Musicians Union were willing to contract unequivocally to submit to the control of their employers and accept whatever disagreeable effect the exercise of that control might have upon them because they felt the advantages to be gained outweighed the resulting disadvantages. By working as employees not only would they gain their primary object of protection under the Social Security Laws, but they would be covered by Workmen's Compensation Laws; they would have priority claims in bankruptcy proceedings; leaders would not be liable for the negligence of sidemen; the records an employer is now required to keep in the operation of his business concerning withholding taxes, expenses accrued, wages paid, etc., would not have to be maintained by leaders, and musicians generally would have wider coverage under Workmen's Compensation Laws and Social Security Laws because musicians in small orchestras would not be excluded from coverage because of an insufficient number of employees.

There are advantages and disadvantages to performing work as an employee, and surely one of the most minor of disadvantages of working in the status of an independent contractor is the payment of social security taxes, amounting in this case, involving six different orchestras, to but $20.98.

The Form B contract clearly then was adopted for the purpose of unequivocally and certainly giving all right of control over the members of orchestras and leaders to the establishments engaging their services, and to make certain that there could be no further misunderstanding or ambiguities concerning the status of leaders and musicians in general in their relationship to those employing their services because at the time of its adoption the Federal District Court had sustained the position of the musicians and held their employers had the right of control.

There are numerous cases of efforts at tax evasion wherein an employer has contrived some scheme by which he claims to have divested himself of the right of control over his employees but actually has retained the right of control. (See *Matcovich* v. *Anglim* (*supra*).)

It will be observed that in each case the scheme of the employer to evade the taxes consisted of reducing the number of his employees, thus depriving the government of both the employee and employer share of the tax. The Form B contract does not do this; in fact the Form B contract increases the number of employees and increases the revenue of the Federal and State Governments under the Social Security Laws. The musicians, sidemen and leaders alike, under the Form B contract, are liable for employees' taxes under the Act. And, rather than being defrauded of revenue, the government gains the revenue of the leaders' payment of an employee's tax or contribution.

Thus there cannot possibly be any tax evasion under the Form B contract.

(2) A taxpayer may lawfully change his status to avoid taxation.

If it is an unlawful scheme of tax evasion and a fraud upon the Government for a person or a group of persons collectively to feel that the advantages of working as an

employee outweigh the disadvantages, and to sacrifice the right of control over the performance of their work for another and to insist upon performing services only as an employee in order that they might gain and participate in these advantages, including the benefits of the Social Security Laws, we know of no decision so holding with the exception of the decision of the District Court below.

This Court has stated the contrary to be the law. In the case of *Gregory* v. *Helvering*, 293 U. S. 465; 55 S. Ct. 266; 79 L. Ed. 596, this Court stated, "The legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether avoid them, by means which the law permits cannot be doubted." In the case of *Commissioner* v. *Tower*, 327 U. S. 280, 66 S. Ct. 532, 90 L. Ed. Adv. Op. 559 (*supra*), this Court reaffirmed and expressly did not "reject that principle," but held "There can be no question that a wife and a husband may, under certain circumstances, become partners for tax, as for other purposes." (See also *Doll* v. *Commissioner*, 149 F. (2d) 239, in which it was held: "The family relationship does not preclude arrangements between its members which will affect tax liability").

The contracts of employment involved in this case cannot then be disregarded in determining the relationship of the parties because under the terms of those contracts employer-employee relationships were created as a matter of law and by the intent of the parties. And there is no evidence to show that the parties varied these contracts by the manner in which they were performed.

Since the parties contracted a particular employment status by expressed contract, that contract must be held conclusive of the intention of the parties thereto in the absence of evidence establishing a subsequent variance of the contract.

C. THE TERMS OF THE WRITTEN FORM B CONTRACTS CANNOT BE VARIED BY PAROL EVIDENCE UNDER THE CIRCUMSTANCES OF THIS CASE.

In the instant case the parties clearly set forth their obligations to one another in the Form B contract. The interveners accepted the obligation of submitting themselves to the control of the petitioner and the petitioner accepted the right to control the services of the musicians and became obligated to the interveners as interveners' employer.

Had interveners known that petitioner would not accept his obligations as an employer after he expressly agreed to occupy the status of the employer of the musicians, they would not have rendered services for him. And if they had, they might well have required other terms and conditions of employment, for they would then have had to accept the obligation of an employer; pay workmen's compensation premiums; accept liability for negligence; employ a clerk to keep records of withholding taxes; arrange for payment of social security taxes before leaving the jurisdiction of the Collector of Internal Revenue; ascertain and abide by the laws of the state governing the obligations of employers and the rights of employees, and meet all of the other requirements of an employer.

This is no action to rescind or modify a contract. There is no allegation of mistake. There is in fact not even a suggestion that the terms of the contract are ambiguous and require an explanation. There is only petitioner's desire not to be bound by those provisions of the contract he disliked after having accepted the performance of interveners. We know of no doctrine or principle of law which allows a party to a contract to disavow and reject his obligations under a contract after enjoying all of its benefits.

The District Court, however held that, "The purpose of a contract is to express the intention of the parties regard-

ing such matters. As between parties, the agreement is generally conclusive as to such intent, but as against a third person, the true intent may be shown" (R. 662).

We acknowledge the law to be as stated by the District Court, that is, that as against a third party, the written provisions of a contract may be varied by parol evidence, but this does not mean that one of the parties to the contract can claim the contract is different than it is, absent an allegation of fraud, mistake, duress or some other basis in law for the rescision or voidance of the contract.

Williston on Contracts, Volume 3, Section 647, page 1867, clearly states the law with relation to the right of third parties to vary the terms of a written agreement to be as follows:

> "• • • if a transaction is in *fraud* of the rights of third persons, it may be shown by parol that the written contract is a scheme, or part of a scheme, *to defraud them*, though in an action between the parties, the writing might be taken at its face value. Furthermore, it does not follow from the parol evidence rule 'that a written contract between A and B, which is conclusive as to them, must be of necessity so, as to the proof of any rights or claims of A against C merely because they grow out of the same business' • • •
>
> "But where the issue in dispute, even between third parties, is what are the obligations of A and B to one another—and those obligations are stated in a written contract, the parol evidence rule is applicable. The written contract represents the truth and the whole truth of the contractual obligations of A and B in whatever way and between whatever parties an inquiry as to such obligation may become important. To admit parol evidence to the contrary which would not be admitted as between the parties except for the purpose of showing either *fraud* against the third person *or some invalidating fact* which would be available to the parties themselves, is to permit facts to be shown which have no relevancy to the issue of what is

the contract between A and B." (Italics supplied.) See also *Root* v. *Robinson*, 55 F. (2d) 303, 80 A. L. R. 471.

In the instant case the parties clearly set forth their obligations to one another in the Form B contract. The interveners accepted the obligation of submitting themselves to the control of the petitioner and the petitioner accepted the right to control the services of the musicians and became obligated to the interveners as interveners' employer. These facts cannot be varied by any parol evidence and are conclusive as to the parties to the contract. *American Crystal Sugar Co.* v. *Nicholos*, 124 F. (2d) 477. As stated in *Labatt, Master and Servant*, Volume I, Section 96(b):

> "When the parties, after conversation and preparation, have at last reduced their agreement to writing, the instrument so drawn up is regarded as the exact expression of their wishes and oral evidence will not be received for the purpose of introducing new terms which will essentially change its meaning and effect."

D. THE CIRCUIT COURT OF APPEALS DID NOT SUBSTITUTE ITS FINDINGS FOR THOSE OF THE DISTRICT COURT, BUT FOUND THAT THE DISTRICT COURT ARRIVED AT ITS FINDINGS BY THE APPLICATION OF A WRONG PRINCIPLE OF LAW.

The Circuit Court of Appeals did not substitute its findings for those of the District Court. The difference in the decisions of the two courts was arrived at from a legal and not factual approach.

The District Court held, as a matter of law, that the contract of employment could be ignored in determining the employment relationship between the parties. The Circuit Court held that the contract could not be ignored but must be presumed in the first instance, to have created the relationship intended by the parties.

If the interveners, under the facts in this case, could

not have created by their contracts of hire the employer-employee relationship as a matter of law because the orchestras had previously been formed, because interveners arrange transportation, because petitioner did not choose to exercise his right of control and because of all the other factors relied upon by the District Court to support its findings, then the District Court was right and the Circuit Court erred. But if interveners could contract to perform their services as a matter of law by submitting themselves to the control of petitioner, then the Circuit Court is right and the District Court erred because interveners did contract to vest control in petitioner, and the performance of their services was not inconsistent with that provision of the contract.

Had Matcovich in the case of *Matcovich* v. *Anglim* (*supra*) performed his contracts of hire in accordance with their terms and had not exercised control, the independent contractual relationship would have existed. (*Anglim* v. *Empire Star Mines Co.*, 129 F. (2) 914) (*supra*).) Had the husband and wife shared the proceeds of the business and conducted themselves like partners in the case of *Commissioner* v. *Tower* (*supra*) their partnership contract would have been held to have created an actual partnership. (*United States* v. *Isham*, 17 Wall. 496, 21 L. Ed. 728; *Gregory* v. *Helvering* (*supra*).)

Had the District Court found facts which established a variance in the performance of the contract with the terms of the contracts, such facts would have been material to show an abrogation of the contract of hire, and the courts conclusion that the employer-employee relationship did not exist would have been supported. The District Court found no evidence of abrogation nor of a variance between the terms of the contract and the performance.

As pointed out heretofore had petitioner demanded that interveners work as his employees and all the other facts

of the case were the same, petitioner could not contend the contract did not establish the employer-employee relationship. *The only fact then upon which the District Court can support its findings is that intervenors and not petitioner demanded that the employer-employee relationship exist.*

Thus, the Circuit Court of Appeals did not in any way substitute its findings for those of the District Court, but found the District Court erred as a matter of law.

III. The Term 'Employee' as Used in the Social Security Act Should Not Be Interpreted in the Light of the Common Law But in the Light of the Broad Social Objectives of the Social Security Act.

The District Court limited its inquiry of petitioner's liability for the taxes, subject of this case, to the question of whether or not petitioner would be considered the employer of the musicians he engaged under the common law. We have shown in our preceding argument that the District Court reached an erroneous conclusion as to petitioner's liability for the tax under this narrow basis for liability for employer taxes under the Social Security Act. We now address ourselves to the argument that the Court erred in holding that liability for employer taxes under the Social Security Act is limited to employers under the common law.

Whether a person is an employer or an independent contractor in the performance of work for others should be determined in the light of the purposes and objectives of the Social Security Act rather than in the light of the common law conception of master and servant. It is only by such means that the purpose of legislation can be carried out in accordance with Congressional intent.[11] This is no

[11] In the case of *McDowell* v. *Duer*, 78 Ind. App. 440, 133 N. E. 839 (1922) (p. 840) the Court, in interpreting a Workmen's Compensation Statute, refused to recognize the doctrine of an independent contractor

longer a debatable point in law as it was conclusively and explicitly settled by this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (April 24, 1944) (*supra*). The *Hearst* case involved the question of whether newsboys are employees under the National Labor Relations Act, and in holding that they were, even though they might not be considered employees under the common-law, this Court stated:

> "The principal question is whether the newsboys are 'employees.' Because Congress did not explicitly define the term, respondents say its meaning must be determined by reference to common-law standards. In their view 'common-law standards' are those the courts have applied in distinguishing between 'employees' and 'independent contractors' when working out various problems unrelated to the Wagner Act's purpose and provisions. . . .
>
> "Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word 'is not treated by Congress as a word of art having a definite meaning. . . .' Rather 'it takes color from its surroundings . . . . (in) the statute where it appears,' United States *v.* American Trucking Association, 310 U. S. 534, 545, 84 L. Ed. 1345, 1352, 60 S. Ct. 1059, and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained." South Chicago Coal & Dock Co. *v.* Bassett, 309 U. S. 251, 259, 84 L. Ed. 732, 737, 60 S. Ct. 544; cf. New Negro Alliance *v.* Sanitary Grocery Co., 303 U. S. 552, 82 L. Ed. 1012, 58 S. Ct. 703; Milk Wagon Drivers'

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outside of the realm of tort, stating: "The doctrine of 'independent contractor' is peculiar to the law of negligence and we are not aware that it is appropriate to any other branch of the law. Certainly, it has no proper place in the law of Workmen's Compensation. We will eliminate that term, therefore, from further consideration."

Union v. Lake Valley Farm Products, 311 U. S. 91, 85 L. Ed. 63, 61 S. Ct. 122."

(See also *Willard* v. *Gentsch* (*supra*).)

In the case of *United States* v. *American Trucking Association*, 310 U. S. 534, 84 L. Ed. 1345 (*supra*), referred to in the *Hearst* decision, this Court in discussing judicial interpretation of the term 'employee' had stated:

> "The word (employee) is not a word of art. It takes color from its surroundings."

This statement is further elucidated in footnote 29 in that case by the following language:

> "That the word 'employee' is not treated by Congress as a word of art having a definite meaning is apparent from an examination of recent legislation. *Thus the Social Security Act specifically provides that 'The term "employee' includes an officer of a corporation.'"* Emphasis ours.)
>
> . . . . . .
>
> "Where the term 'employee' has been used in statutes without particularized definition it has not been treated by the courts as a word of definite content."

This Court's decision in the *Hearst* case has been followed in recent appellate court decisions involving the question of liability for employer taxes under the Social Security Act. In *United States* v. *Vogue*, 145 F. (2d) 609 (*supra*) (decided November 13, 1944), Judge Parker speaking for the Fourth Circuit Court of Appeals stated:

> "Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act, like the Fair Labor Standards Act, 29 U. S. C. A. Sec. 201 et seq., and the National Labor Relations Act,

29 U. S. C. A. Sec. 151 et seq., was enhanced pursuant to a public policy unknown to the common law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability. "Red caps" have been held employees of railroads within the Fair Labor Standards Act. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914; *Southern Ry. Co.* v. *Black*, 4 Cir., 127 F. 2d 280. Needleworkers engaged in processing materials in their own homes on a piece work basis have been held within the act. *Walling* v. *American Needlecrafts*, 6 Cir., 139 F. 2d 60. And newsboys have been held employees within the meaning of the National Labor Relations Act. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851."

In the case of *Grace* v. *Magruder*, 148 F. (2d) 679 (supra), the United States Court of Appeals for the District of Columbia passed on this same question as it involved itinerant workers over whom the employer exercised little if any actual control and stated:

"The other alternative—upon which appellant relies—is that these persons are independent contractors. To support this interpretation, he cites the Gould case (Gould *v.* Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211) for the proposition that taxing statutes should be strictly construed. *But these statutes are primarily remedial and require construction which will give effect to the intention of Congress, "in the light of the mischief to be corrected and the end to be attained," their taxing phase is secondary and incidental.*" (emphasis ours.)

In dealing with the Fair Labor Standards Act (52 Stat. 1060; 29 U.S.C.A. 201) the same rule of interpretation was applied in *Walling* v. *American Needlecrafts* (130 F. (2d) 63)

And the Committee on Ways and Means of the House of Representatives in reporting its proposed 1939 amendments to the Social Security Act, said:

> "A restrictive view of the employer-employee relationship should not be taken in the administration of the Federal old age and survivors insurance system, in making coverage determinations. *The tests for determining the relationship laid down in cases relating to tort liability and to the common law concept of master and servant should not be narrowly applied.* (Emphasis supplied.) (House Report No. 728, 76th Congress, First Session, page 76.)

The broad social objectives of the Social Security Act are shown by its executive and legislative history and are elucidated in *Helvering* v. *Davis*, 301 U. S. 169, 57 S. Ct. 904, 81 L. Ed. 1307 (1937) and *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1937).

The objectives of the Act indicate that the term "employee" as used in the Act was intended to apply to that class of persons who promote in some way the business of others and whose economic welfare is, therefore, largely within the control of those for whom they render service.

Interveners come within that class. They do not operate businesses. They do not seek profits from the expenditure of money by the public. They seek only employment for wages in the same manner that the teller of a bank or the factory worker might seek employment, that is, to render services to another for the benefit and profit of the other and in return to be compensated for their work by the payment of wages or salaries or share of the profit from those for whom they work.

The services of musicians are personal. They are not engaged merely to provide musical entertainment for an employer totally disinterested in how such musical entertainment is performed or by whom such musical enter-

tainment is performed. Their employer wants them personally because he contemplates making a profit from their personal efforts. They cannot subcontract the work as an independent contractor can, for their employer is not interested only in the final accomplishment of the work but is interested in the way the work is performed every minute it is being performed as the profits their employer hopes to gain from their services are dependent upon the work of the musicians personally. When musicians render services in a restaurant, the owner profits from their services in the same way he profits from the services of the cooks and waiters, and when the musicians performed for petitioner, he sought to profit from their services in the same way.

While leaders might accept a portion of their compensation from the receipts of the employer, they always work for a basic wage, the scale for leaders as provided in the Constitution and By-laws of the American Federation of Musicians (R. 368). They cannot suffer a loss then on any employment, only the disappointment of not receiving as much as anticipated the same as any other employee might not get as much as anticipated from his employer under a bonus arrangement based upon the employer's profits.

Some orchestra leaders "obtain phenomenal success" (R. 657); however they are the exception to the rule. Where one might become famous, a hundred will remain unknown. The trials, tribulations and the needs of the hundred are obscured by the fame of the one. But the Social Security Act embraces them all. The one hundred thousand dollar a year president of a great corporation is within the orbit of the Social Security Act in the same manner as is the most menial clerk of that corporation who just could not make the grade. And there is no more reason for concluding that orchestra leaders are not within

that class of persons the Social Security Act intended to benefit because a few who are well known to the general public have no immediate need for benefits under the Act, than to conclude that all employees of corporations are not within the class of persons intended to be benefited by the Social Security Act because some employees of some corporations obviously are not in immediate need of benefits.[12]

Musicians, including leaders, become unemployed when no one desires their services, and they face loss of employment opportunities when they become older, in the same manner and to the same degree as any other category of workmen. In fact because of the personal nature of their work, employment opportunities for musicians become more scarce as they grow older to a greater degree than many other categories of workmen.

The Social Security Act clearly was intended to embrace workers of this sort, along with all other workers. Musicians, including leaders, are included within the broad social objective of the Social Security Act, and it was error for the District Court to narrowly interpret the Act to exclude them.

CONCLUSION

Only if interveners were prohibited by law from performing their services for petitioner as employees can the decision of the Circuit Court of Appeals be reversed and the District Court affirmed, because interveners clearly submitted themselves to the control of petitioner by the expressed provisions of their contract. To ignore that contract in determining the employment status of the parties

[12] While the Court below found each of the interveners to be leaders of "name bands" it will be observed that earnings were not high; for example, Tiny Hill received but $15.00 for an engagement (R. 99) and Buddy Fisher but $11.55 (R. 89).

would deny to them the right to perform services in the relationship they contracted.

The decision of the Circuit Court of Appeals should be affirmed by this Court.

Respectfully submitted,

JOSEPH A. PADWAY,
ROBERT A. WILSON,
736 Bowen Building,
Washington 5, D. C.;
CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa,
Attorneys for Interveners,
Respondents.

APPENDIX A

Statutes and Regulations

Section 1426 of the Internal Revenue Code, as amended by Section 606 of Social Security Act Amendments of 1939 (26 U. S. C., Sec. 1426): "DEFINITIONS.

* * * * * * * * *

"(b) *Employment.* The term 'employment' means * * * any service, of whatever nature, performed * * * by an employee for the person employing him." * * * *

* * * * * * * * *

The definition of employment in Section 1607 (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939, is identical.

Treasury Regulations 106, pertaining to the Federal Insurance Contributions Act:

> "Sec. 402.204. *Who are employees.* Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> "Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the fur-

nishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

"Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

"Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to con-

stitute employment within the meaning of the Act • • • ."

Treasury Regulations 107, Section 403.204, pertaining to the Federal Unemployment Tax Act, are identical.

APPENDIX B

April 12, 1941.

Stevens Hotel Corporation, Michigan Boulevard at Balbo Drive, Chicago, Illinois.

Attention: Mr. J. A. Jones, Resident Manager

Sirs:

Reference is made to your letter dated March 19, 1941, in which you submit certain information requested by this office in connection with a determination of the status, for purposes of the taxes imposed by Subchapters A and C of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of Mr. Ray Heatherton and the musicians performing services under his direction at your establishment pursuant to a contract dated January 28, 1941.

You express the opinion in your letter that the legal relationship of employer and employee does not exist between the Stevens Hotel Corporation and Mr. Heatherton and the members of his orchestra. It is contended by you that Mr. Heatherton is an independent contractor, and your reasons for so believing are set forth.

Consideration has been given to the reasons set forth in your letter. However, it is noted that under the terms of the contract pursuant to which the orchestra is performing services, the Corporation engaged the personal services of eight musicians and a girl vocalist under the leadership of Mr. Heatherton. The contract specifies the place where the engagement

is to be performed, the dates of the engagement, and the lump-sum weekly payment for the services of the orchestra. It is expressly stated in the contract that the Corporation shall have complete control of the services to be rendered thereunder. It is also provided that Mr. Heatherton as leader shall distribute the amount received from the Corporation to the musicians in accordance with the list appearing on the reverse side of the contract. Such list shows the names of the members of the orchestra, their social security account numbers, and their individual compensation. The contract is signed by a representative of the Corporation and by an employee of the Music Corporation of America, a booking agency, for Mr. Heatherton.

In view of the express terms of the contract it is clear that the Corporation has the right to exercise over Mr. Heatherton and the other members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, held that Mr. Heatherton and the other members of the orchestra are employees of the Stevens Hotel Corporation for purposes of the taxes in question.

Respectfully,

(Signed) GUY T. HELVERING,
Commissioner.

cc. Collector, Chicago, Illinois

INTERVENERS' APPENDIX C

FILED IN U. S. DISTRICT COURT DECEMBER 13, 1944

Treasury Department

Office of Commissioner of Internal Revenue

Washington 25, D. C.
November 2, 1944.

A&C:IT-Mimeograph
Coll. No. 5767
R.A. No. 1394

Status of Variety Entertainers for Federal Employment Tax Purposes and for Purposes of the Income Tax Withholding Under the Current Tax Payment Act of 1943.

Collectors of Internal Revenue, Internal Revenue Agents In Charge, and Others Concerned:

1. In A&C:IT-Mimeograph Coll. No. 5638, R. A. No. 1339, dated February 21, 1944, it was stated that the Bureau was unable at that time, to rule conclusively on the status of certain variety entertainers. In general such variety entertainers are those who acquire and perform their own repertoires in a series of short-term engagements for a number of different operators under contracts which ordinarily specify only the time, remuneration, place, and duration of each engagement. The Bureau further stated, however, that until a conclusive ruling is made, operators of theatres, night clubs, restaurants and similar establishments may consider such entertainers to be independent contractors.

2. Generally variety entertainers perform their special routines in a series of short-term engagements for a number of different operators of theatres, night clubs, restaurants, and similar establishments under contracts which ordinarily specify only the time, remuneration, place and duration of each engagement. The control, if any, which is exercised by such operators over the performance of their services is purely incidental to the continuity of the entertainment programs. Such entertainers will be considered to be inde-

pendent contractors for Federal employment tax purposes and for purposes of the income tax withholding under the Current Tax Payment Act of 1943.

3. Paragraph 2 is not applicable in the case of those performers in a "stage show", "floor show", etc., who are clearly in the operator's employ, e.g., an orchestra, glee club, and chorus line.

4. This mimeograph does not change the position of the Bureau with respect to musicians, entertainers, or actors who perform service pursuant to a "Form B" contract or other contract having substantially similar provisions as stated in Paragraph 2 of A&C:IT-Mimeograph Coll. No. 5638, R. A. No. 1339. The rule stated in such paragraph of the mimeograph is equally applicable in the cases where leaders of orchestras pursuant to "Form B" contracts or other contracts having substantially similar terms undertake to furnish a "complete unit of entertainment" comprised of orchestra members and "acts" irrespective of whether remuneration is on the basis of a stated sum or on a percentage of the gross receipts. Variety entertainers performing services under such circumstances and conditions are excluded from the rule contained in Paragraph 2 hereof and are considered to be employees of the operator.

5. Inquiries relating to the income tax withholding should be addressed to this Bureau for the attention of IT:P:T. Inquiries relating to employment taxes should be addressed for the attention of A&C:RR. Correspondence otherwise relating to the contents of this mimeograph should refer to the number thereof and the symbol A&C:RR.

JOSEPH D. NUNAN, JR.,
Commissioner.

APPENDIX D

Rainbow Randevu Ballroom

October 18, 1944.

A&C:RR:3-SAH.

Collector of Internal Revenue, Post Office Box 1288, Salt Lake City 10, Utah.

Attention: Emt:FBM.

Reference is made to your letter dated October 9, 1944, and enclosures, relative to the Federal employment tax status of Mr. Les Brown and Mr. Jan Garber and the members of their orchestras with respect to services performed for Mr. Jerry Jones, doing business as the Rainbow Randevu Ballroom, Salt Lake City, Utah, pursuant to the terms of "Form B" contracts dated December 27, 1943, and July 21, 1943, respectively, copies of which were furnished.

Mr. Jones contends that the leaders and members of their orchestras mentioned above were not his employees irrespective of the form of contract under which they were engaged and refers to the ruling made in office letter dated November 20, 1942. Such ruling holds that Mr. Sonny Dunham and the members of his orchestra were not employees of Mr. Jones with respect to services performed by them pursuant to the terms of a contract dated August 14, 1940, on a contract form of the William Morris Agency, Inc.

The status of leaders and the members of their orchestras depends to a large extent on the terms of the contracts under which their services were performed. The contract under which Mr. Dunham and the members of his orchestra performed their services is similar in terms to that which was considered in Williams *v.* United States, 126 Fed. (2nd) 129 (C. C. A. 7; 1942). The Bureau has decided to follow the decision reached in that case in determining the status of orchestra members who perform services under

contracts and circumstances and conditions which do not differ in any material respect from the cited case.

The terms of the contract commonly referred to as Form B, the form of contract adopted by the American Federation of Musicians for use in connection with engagements of musicians on and after June 1, 1941, provide for the employment of a certain number of musicians, including the leader, designated as employees, to render personal services for the purchaser, the employer; that the employer shall, at all times, have complete control over the services which the employees will render under the specifications of the contract; and that on behalf of the employer the leader will distribute the amounts received from the employer to the employees, including the leaders.

The extended consideration which has been given to the terms of the "Form B" contract, and the circumstances and conditions under which the leaders and members of their orchestras perform services thereunder, has led to the conclusion that the purchaser of the music has the right to exercise over the leader and the members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee between the parties. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, the ruling of the Bureau that leaders and members of the orchestras who perform services under this form of contract are employees of the purchaser for Federal employment tax purposes. Your attention is invited to paragraph two of A&C:IT-Mimeograph Coll. No. 5638.

(Signed) VICTOR H. SELB
Acting Deputy Commissioner.

SUPREME COURT OF THE UNITED STATES

Nos. 731 AND 732.—OCTOBER TERM, 1946.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d. b. a. Crystal Ballroom, Petitioners,

731 v.

E. H. Birmingham, Individually and as Collector of Internal Revenue, for the State of Iowa, Griff Williams, et al.

Larry V. Geer and Margaret Geer, d. b. a. Larry Geer Ballrooms, Petitioners,

732 v.

E. H. Birmingham, Individually and as Collector of Internal Revenue for The State of Iowa.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[June 23, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

Petitioners, operators of public dance halls, brought these actions, which were consolidated for trial, against the respondent Collector of Internal Revenue to recover taxes paid under the Social Security Act, Titles VIII and IX, and I. R. C., c. 9, subchap. A and C. Recovery depends on whether petitioners' arrangements for bands to play at the dance halls made the band leaders and other members of the bands employees of the petitioners or whether, despite the arrangements, the leaders were independent contractors and therefore themselves the employers of the other members. Several band leaders were allowed to intervene in the *Bartels* case as defendants to protect their own interests. After a recovery in the District Court was reversed by the Circuit Court of Appeals, *Birmingham* v. *Bartels*, 157 F. 2d 295, they sought

certiorari which we granted because of the importance of the issue to the administration of the Act. — U. S. —. See Nos. 312 and 673, *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, decided June 16, 1947.

These cases are not concerned with musicians hired by petitioners to play regularly for their dance halls but with "name bands" hired to play for limited engagements at their establishments. These bands are built around a leader whose name, and distinctive style in the presentation and rendition of dance music, is intended to give each band a marked individuality. The leader contracts with different ballroom operators to play at their establishments for a contract price. Almost all of the engagements here involved were one-night stands, some few being for several successive nights. The trial court found, and there is no real dispute, that the leader exercises complete control over the orchestra. He fixes the salaries of the musicians, pays them, and tells them what and how to play. He provides the sheet music and arrangements, the public address system, and the uniforms. He employs and discharges the musicians, and he pays agents' commissions, transportation and other expenses out of the sum received from the dance hall operators. Any excess is his profit and any deficit his personal loss. The operators of the dance halls furnish the piano but not the other instruments.

The American Federation of Musicians, of which the leaders and the musicians are members, adopted a standard contract known as "Form B." The terms of this contract create the difficulties in the determination of this case. As compensation to the bands, some contracts call for a guaranteed sum, with the privilege to the bands to take a percentage of the gross. Other contracts are for a fixed sum, only, and others for a percentage of gross, not to exceed a fixed sum. The contract states that the ballroom operator is the employer of the musicians and their leader, and "shall have complete control of the serv-

ices which the employees will render under the specifications of this contract." The form paragraph, so far as pertinent, is set out in the margin.[1] The District Court found that the contract was adopted by the Union in order to shift the incidence of the social security taxes from the leader to the ballroom operator, and that it had no practical effect on the relations between the musicians, leader, and operator. The District Court held that the question of employment under the Act was one of fact, and that the contract was only one factor to be considered. Since the District Court believed that the contract was not entered into "by fair negotiation" and that its purpose was to protect the leaders from taxes as employers, it concluded that the contract was of no effect and that the leader was an independent contractor employing the musicians.

The Circuit Court of Appeals thought otherwise. It concluded that the test of employment was the common law test of control, *i. e.*, that one was an employer if he

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[1] "Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams, according to the following terms and conditions:

. . . . . .

"The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. . . ."

had the "right" to direct what should be done and how it should be done. It concluded that the contract between the parties gave the ballroom operators the "right" to control the musicians and the leader, whether or not the control was actually exercised. While the majority thought that such a contract was not binding on the Government, they thought it was binding on the parties and would control liability for employment taxes if the Bureau of Internal Revenue chose to accept the arrangement as valid. *Birmingham* v. *Bartels*, *supra*, at 300.

The Government here relies entirely on the contract, conceding that otherwise the bandleaders are independent contractors employing the musicians. On the other hand, the bandleaders involved contend also that though the contract be thought inconclusive, the leaders and musicians are employees of the operators. They rely upon the dependence of the orchestra members upon the ballroom operators judged in the light of the purposes of the Act.

In *United States* v. *Silk*, No. 312, *supra*, we held that the relationship of employer-employee, which determines the liability for employment taxes under the Social Security Act was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers. Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In *Silk*, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls. These standards are as important in the enter-

tainment field as we have just said, in *Silk*, that they were in that of distribution and transportation.

Consideration of the regulations of the Treasury and the Federal Security Agency, quoted in *Silk* at note 8, is necessary here. I. R. C., chap. 9, §§ 1429, 1609. Under those regulations, the Government successfully resisted the effort of a leader of a "name" band, like those here involved, to recover social security taxes paid on the wages of the members of his organization. *Williams* v. *United States*, 126 F. 2d 129. The contract in that case was not "Form B" and did not contain any corresponding control clause. Two years later, the Commissioner of Internal Revenue issued mimeographs 5638, 1944–5–11651, and 5767, 1944–22–11889, C. B. 1944, pp. 547–48. They were directed at the status of musicians and variety entertainers appearing in theatres, night clubs, restaurants and similar establishments. Collectors and others were therein advised that a "Form B" or similar contract with the entertainers made operators of amusement places liable as employers under the Social Security Act. In the absence of such a contract, that is, in reality, the absence of the control clause of "Form B," the entertainers, "with short-term engagements for a number of different operators" of amusement places, would be considered "independent contractors." The argument of respondents to support the administrative interpretation of the regulations is that the Government may accept the voluntary contractual arrangements of the amusement operators and entertainers to shift the tax burden from the band leaders to the operators.[2] Cases are cited to support this position.[3] All of these cases, however, involve the problem of cor-

[2] There is a contention that the contracts were coerced because the operators could not secure these musicians under other arrangements. We do not find it necessary to rely or pass upon that contention.

[3] *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415; *New Colonial Ice Co.* v.

porate or association entity. They are not pertinent upon the question of contracts to shift tax liability from one taxpayer to another wholly distinct and disconnected corporation or individual. We do not think that such a contractual shift authorizes the Commissioner to collect taxes from one not covered by the taxing statute. The interpretive rulings on the Regulations, referred to in this paragraph do not hav the force and effect of Treasury Decisions.[4] We are of the opinion that such administrative action goes beyond routine and exceeds the statutory power of the Commissioner. *Social Security Board v. Nierotko*, 327 U. S. 358, 369–70.

This brings us then to a determination of whether the members of a "name band" under the circumstances heretofore detailed are employees of the operator of the dance hall or of the leader. If the operator is the employer, the leader is also his employee.

We are of the opinion that the elements of employment mark the band leader as the employer in these cases. The leader organizes and trains the band. He selects the members. It is his musical skill and showmanship that determines the success or failure of the organization. The relations between him and the other members are permanent; those between the band and the operator are transient. Maintenance costs are a charge against the price received for the performance. He bears the loss or gains the profit after payment of the members' wages and the other band expenses.

The judgments of the Circuit Court of Appeals are reversed and those of the District Court are affirmed.

Helvering, 292 U. S. 435; *Helvering* v. *Coleman-Gilbert Associates*, 296 U. S. 369, 374; *Higgins* v. *Smith*, 308 U. S. 473, 477; *Gray* v. *Powell*, 314 U. S. 402; *Moline Properties, Inc.* v. *Commissioner*, 319 U. S. 436, 439; *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590; *Schenley Corp.* v. *United States*, 326 U. S. 432, 437.

[4] See Cum. Bull. (1944), notice, p. 1.

SUPREME COURT OF THE UNITED STATES

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732 *v.*

E. H. Birmingham, Individually and as Collector of Internal Revenue for The State of Iowa.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[June 23, 1947.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting.

As the opinion of the Court points out, the Form B contract involved in the present case was adopted, with the approval of the Commissioner of Internal Revenue, after it had been held under an earlier form of contract that members of the orchestra were employees of the band leader. On the face of the present contract the dance hall proprietor is the employer even under traditional concepts of master and servant. For he has all of the conventional earmarks of the entrepreneur—ownership, profit, loss, and control—if the provisions of the contract alone are considered. Then the requirements of the Social Security Acts are satisfied. And to hold the dance hall proprietor liable for the tax is not to contract the coverage contemplated by the statutory scheme.

I think the tax collector should be entitled to take such private arrangements at their face. In other situations a taxpayer may not escape the tax consequences of the business arrangements which he makes on the grounds that they are fictional. The Government may "sustain or disregard the effect of the fiction as best serves the purposes of the tax statute." *Higgins* v. *Smith*, 308 U. S. 473, 477. That rule is not restricted in its application to the use by taxpayers of corporate or related devices to obtain tax advantages. It was applied in *Gray* v. *Powell*, 314 U. S. 402, where a railroad sought exemption from the Bituminous Coal Act by contending that the operations of one who appeared to be an independent contractor were in fact its operations. The Court in rejecting the contention said that "The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan." *Id.*, 414. I see no reason for creating an exception to that rule here. If the Government chooses to accept the contract on its face, the parties should be barred from showing that it conceals the real arrangement. Tax administration should not be so easily embarrassed.